(19,257.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 200.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, ET AL., PLAINTIFFS IN ERROR,

vs.

LUCRETIA L. GREEN, WILLIAM E. GREEN, EFFIE GREEN, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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a-10 And thereafter and on, to-wit: September 22, 1900, said plaintiffs filed their amended petition in said court and cause, and said amended petition is in the words and figures following, to-wit:

In the District Court in and for the County of Wyandotte and State of Kansas.

SANFORD M. GREEN, LUCRETIA L. GREEN, WILLIAM E. GREEN, and Effie Green, Plaintiffs,
vs.
R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, Allen F. Reed, Al. Payne, T. J. Payne, John Small, and George Dunbar, Defendants.

Amended Petition.

Comes now the said plaintiffs and for their amended petition herein allege: That the plaintiffs are the owners in fee simple of the following described real estate lying, being and situate in the county of Wyandotte, State of Kansas, to-wit:

Lots eighteen (18), forty two (42), forty three (43), forty four (44), forty five (45), and forty seven (47) in block ten (10); lots eight (8), ten (10), eleven (11), twelve (12), thirteen (13), twenty seven (27), twenty eight (28), twenty nine (29) and thirty (30), in block eight (8); lots eighteen (18), nineteen (19), twenty (20), twenty three (23), twenty-four (24), twenty five (25), twenty six (26), thirty five (35) and thirty six (36) in block eleven (11); lot nine (9) in block twelve (12); lots thirty three (33) and thirty four (34), in block thirteen (13); lots nineteen (19) and twenty (20), in block sixteen (16); lots twenty (20) and twenty one (21) in block nineteen (19); lot one in block seven (7), all in Argentine Heights, and addition to the city of Argentine as shown by the recorded plat thereof on file in the office of the register of deeds of the said county of Wyandotte, State of Kansas. That said plaintiffs are entitled to the possession thereof, and that the said defendants unlawfully keep the said plaintiffs out of the possession thereof.

The plaintiffs aver on information and belief that the said defendants are wholly insolvent and irresponsible and the dam-
11 ages suffered by these plaintiffs cannot be recovered from the said defendants in any way whatever, which said damages the plaintiffs aver amount to the sum of five hundred dollars.

Wherefore, these plaintiffs pray judgment for the possession of their said lands and lots, that the said defendants and each of them be evicted therefrom, and that the said plaintiffs have proper writs of assistance to carry out such judgment. That pending the trial

of this action the said defendants and each of them be restrained, enjoined and prohibited from doing or continuing to do the acts herein complained of and now threatened to be done by the said defendants pending the trial of this action and that upon the final hearing these temporary orders be made perpetual, that — have and recover judgment for the sum of one thousand dollars, their damages so as aforesaid sustained, and the costs of this action, and that after a full hearing of this action upon its merits that the plaintiffs may have such other, further and different relief as in justice they may be entitled.

F. M. WOODS,
McHALE & LEARNARD,
Plaintiffs' Att'ys.

STATE OF KANSAS, }
Wyandotte County, } *ss:*

Sanford M. Green, of lawful age, being first duly sworn, says that he is one of the plaintiffs above named, that he has read and heard read the above and foregoing petition and knows the contents thereof, that the same is true, that such matters as are therein stated upon information and belief he believes to be true.

SANDFORD M. GREEN.

Subscribed and sworn to before me this 13 day of September, 1900.

CHARLES DAUZENROTH, *J. P.*

Endorsed on the back: "14636. S. M. Green *et al.*, plaintiffs, *vs.* R. R. Dunbar *et al*, defendants. Petition (amended). Filed Sept. 22, 1900. A. Gunning, clerk, by Wm. Needles, deputy. F. M. Woods, McHale & Learnard, attorneys for plaintiffs."

12 And thereafter and on, to-wit: November 19, 1900, said cause was submitted to the court on an agreed statement of facts, and the journal entry thereof is found in Journal 24 at page 226, and is in the words and figures following, to-wit:

MONDAY, *November* 19, 1900.

SANDFORD M. GREEN ET AL., Plaintiffs,
vs.
R. R. DUNBAR ET AL., Defendants. } No. 14636.

And now on this day this cause comes regularly on for trial, plaintiffs appear by F. M. Woods and I. F. Madlem, their attorneys, and defendants appear by L. F. Bird and H. G. Pope, their attorneys. And thereupon on motion of said defendants leave is given to said defendants to file answer herein within one day. And thereupon

on motion of said defendants it is ordered that plaintiffs file good and sufficient bond for costs herein to be approved by the clerk within 5 days from this date. And now come the parties hereto and submit to the court their agreed statement of facts herein, and the court thereupon takes said statement of facts under advisement, and it is ordered that counsel file briefs of arguments and authorities herein within 20 days. judgment reserved.

And said agreed statement of facts is as follows, to-wit:

13 In the District Court of Wyandotte County, Kansas.

SANFORD M. GREEN, LUCRETIA L. GREEN, WILLIAM E. Green, and Effie Green, Plaintiffs,
vs.
R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHington, Allen F. Reed, Al. Payne, T. H. Payne, John Small, and George Dunbar, Defendants. } No. 14636.

Agreed Statement of Facts.

The land in controversy herein, to-wit: lots situated and described in plaintiff's petition and located in Wyandotte county, State of Kansas, and in the northwest quarter of section 29, township 11, range 25 east, was patented to Susan Whitefeather, as the head of a family consisting of herself and George Washington her son, and members of the Shawnee tribe of Indians, on December 28th, 1859, by the United States. That the following is a true copy of said patent:

" Book 2, page 296.

The United States of America
to
Susan Whitefeather.

Patent No. 317, dated Dec. 28, 1859; recorded Jan. 25, 1878.

Whereas, under the provisions of the 2nd and 9th articles of the treaty concluded on the 10th day of May, 1854, between the commissioners on the part of the United States and the delegates of the United Tribe of Shawnee Indians, certain members of said tribe became entitled out of the lands ceded by said treaty, if a single person to 200 acres and if the head of a family a quantity equal to 200 acres for each member of his or her family and to a patent therefor upon provision being made by Congress for the issuing of the same which has been done by the 11th section of the act of Congress, approved Nov. 3, 1859 (U. S. Statutes vol. II page 430). And whereas, it appears from Reservation Book C, accompanying a return

dated November 6, 1857, from the office of Indian Affairs to the General Land Office, that these have been located and approved as the selection of Susan Whitefeather, the head of a family consisting of herself and George Washington, the following described tracts of land, to-wit: the northeast quarter of the northeast quarter, and the west half of the northeast quarter, and the east half of the northwest quarter, all in section 30, township 11, range 25; the northwest quarter of section 29, township 11, range 25; the northwest quarter of section 29, township 11, range 25; and the southeast quarter of the northeast quarter of section 30, township 11, range 25—400 acres.

Now know ye, that the United States of America, in consideration of the premises and in accordance with the directions of the Secretary of the Interior, under the aforesaid 11th section of the act of Congress of Nov. 3, 1859, have given and granted, and by these presents do give and grant unto the said Susan Whitefeather, and to her heirs, the tracts of land above described, with the stipulation prescribed by the Secretary of the Interior under the act of Congress aforesaid, of March 3, 1859, that the said tracts shall never be sold or conveyed by the grantee or her heirs, without the consent of the Secretary of the Interior for the time being.

To have and to hold the said tracts of land with the appurtenances unto the said Susan Whitefeather and to her heirs
14 and assigns forever, with the stipulation aforesaid.

In testimony whereof, I, James Buchanan, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this 28th day of December, 1859, and of the Independence of the United States the 84th.

By the President,

[SEAL.] JAMES BUCHANAN,
By J. A. B. LEONARD, *Secretary.*

JAS. L. WILSON,
Acting Recorder of General Land Office ad Interim.

GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 21, 1878.

I do hereby certify that the annexed copy of a patent, dated Dec. 28, 1859, in favor of Susan Whitefeather, is a true and literal exemplification from the records of this office.

(Test name and seal of office.)

J. A. WILLIAMSON,
Commissioner of General Land Office."

It is further agreed that the tribal relations of said Shawnee Indians as a tribe existed and was so recognized by the political department of the United States Government on December 30, 1870, and all times prior to said date, and is still so recognized.

It is further agreed that the following patent to land located in Johnson county, State of Kansas, from the United States to George Washington, as the head of a family consisting of himself, Judy Washington, David Washington and Rebecca Washington, by patent (Shawnee) number 333, is a true and correct copy of said patent as recorded in vol. Z, page 540, in the register of deeds' office in Johnson county, Kansas, to-wit:

"Book Z, page 540.

The United States of America
to
George Washington.

Patent No. 333, dated Dec. 28, 1859; recorded April 29, 1873.

Whereas, under the provisions of the 2nd and 9th articles of the treaty concluded on the 10th day of May, 1854, between the commissioners on the part of the United States and the delegates of the United Tribe of Shawnee Indians, certain members of said tribe became entitled out of the lands ceded by said treaty, if a single person, to 200 acres and if the head of a family a quantity equal to 200 acres for each member of his or — family and to a patent therefor upon provision being made by Congress for the issuing of the same which has been done by the 11th section of the act of Congress, approved Nov. 3, 1859 (U. S. Statutes, vol. 11, page 430). and whereas, it appears from Reservation Book C, accompanying a return dated November 6, 1857, from the Office of Indian Affairs to the General Land Office, that there have been located and approved as the selection for George Washington, the head of a family consisting of himself, Judy Washington, David Washington, and Rebecca Washington, the following described tracts of land, to-wit: The east one-half of the northeast quarter of section 17 (80 acres); the south one-half of the northwest quarter of section 16 (80 acres); and the northeast quarter of the southwest quarter of section 16 (40 acres); in township 15, south of range 23 east; the west one-half of the southeast quarter of section 16 (80 acres); the east one-half of the northeast quarter of section 16 (80 acres); and the southwest quarter of the northeast quarter of section 16 (40 acres); in township 15, south of range 23 east; the north one-half of the
15 northwest quarter of section 16 (80 acres); the east one-half of the southwest quarter of section 9 (80 acres); and the northwest quarter of southwest quarter of section 9 (40 acres); in township 15, south of range 23 east; the northeast quarter of section 9 (160 acres); and the northwest quarter of the southeast quarter of section 9 (40 acres) in township 15, south of range 23, east of the sixth principal meridian, in Kansas, containing in the aggregate eight hundred acres.

Now know ye, that the United States of America, in consideration of the premises and in accordance with the directions of the Secretary of the Interior, under the aforesaid 11th section of the act of Congress of Nov. 3, 1859, have given and granted, and by these presents do give and grant unto the said George Washington, as the head of the family as aforesaid, and to his heirs the tract of land above described, but with the stipulation prescribed by the Secretary of the Interior under the act of Congress aforesaid, of March 3, 1859, that the said tracts shall never be sold or conveyed by the grantee or his heirs, without the consent of the Secretary of the Interior for the time being.

To have and to hold the said tracts of land with the appurtenances unto the said George Washington as the head of the family as aforesaid, and to his heirs and assigns forever, with the stipulation aforesaid.

In testimony whereof, I, James Buchanan, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed. Given under my hand at the city of Washington this 28th day of December, 1859, and of the Independence of the United States the 84th.

By the President:

JAMES BUCHANAN,
By J. A. B. LEONARD, *Secretary.*

JAS. L. WILSON,
Acting Recorder of General Land Office ad Interim.

Recorded vol. of Shawnee Reserves page 333."

It is further agreed that the following is a true and correct copy of the probate records of Johnson county, State of Kansas, in the appointment of Jonathan Gore as the guardian of George Washington, minor heir of George and Judy Washington of Johnson county, Kansas, to-wit:

"*Petition and Oath of Appointment.*

STATE OF KANSAS, }
County of Johnson, }

In Probate Court of Johnson county, Kansas.

Petition.

To the Hon. B. P. Noteman, probate judge, your petitioner, George Washington, would most respectfully represent that he is a minor over the age of fourteen years, and that his parents are both deceased.

2nd. That he has real estate in said county of which he is the heir thereto.

3rd. That your petitioner therefore prays this hon. court to appoint Jonathan Gore of Johnson county, Kansas, guardian of his person and property and for such other and further relief as may seem just and reasonable.

his
GEORGE x WASHINGTON.
mark.

STATE OF KANSAS, }
County of Johnson, } ss:

George Washington on his oath says that the statements and facts set forth in the above and foregoing petition are true in substance and in fact.

his
GEORGE x WASHINGTON.
mark.

Subscribed in my presence and sworn to this 27th day of Nov. A. D. 1867.

B. P. NOTEMAN,
Probate Judge.

STATE OF KANSAS, }
County of Johnson, } ss:

16 Jonathan Gore, of lawful age, being first duly sworn deposeth and saith that he will faithfully and impartially discharge the duties of guardian of the person and property of George Washington, a minor heir of George Washington and Judy Washington, deceased, and over the age of fourteen years according to law.

JONATHAN GORE.

Subscribed in my presence and sworn to before me this 27th day of Nov. A. D. 1867.

B. P. NOTEMAN,
Probate Judge.

Filed Nov. 27th, 1867.
B. P. NOTEMAN,
Probate Judge.

Letters of Guardianship.

STATE OF KANSAS, }
County of Johnson, } ss:

The State of Kansas to all persons to whom these presents shall come, Greeting:

Know ye, that whereas George Washington, minor, — possessed of property in this State which may be lost, destroyed or diminished

in value, if speedy care be not taken of the same. To the end, therefore, that said property may be collected, preserved and disposed of according to law, we do hereby appoint Jonathan Gore, guardian of all and singular, the goods and chattels, rights and credits which are of the said minor, with full power and authority to secure and dispose of said property according to law and collect all moneys due said minor, and in general to do and perform all other acts and things which are now or hereafter may be required by law.

In testimony whereof, I, B. P. Noteman, judge of the probate court in and for the county of Johnson aforesaid have hereunto signed my name and affixed the seal of said court at office this 27th day of November, A. D. 1867.

[SEAL.] B. P. NOTEMAN,
Probate Judge."

It is agreed that the above and foregoing is a true and correct copy of the only proceedings in the probate court of Johnson county, Kansas, in the appointment of Jonathan Gore as the guardian of any George Washington, a minor and Shawnee Indian, and member of the Shawnee tribe of Indians in the State of Kansas.

It is further understood and agreed that the only land or lands in which George Washington, minor heir of Susan Whitefeather was interested in, was or were all located in Wyandotte county, State of Kansas.

It is further agreed and understood that the following is a true and correct copy of the probate records of Johnson county, Kansas, and recorded in volume 2, page 390 of said probate court, in reference to the sale of the northwest quarter of section 29, township 11, south of range 25, being and situated in Wyandotte county, Kansas, by Jonathan Gore, guardian, to-wit:

Probate Court, Johnson County, State of Kansas, January Term, 1869.

MARCH 2ND, 1869.

Court met pursuant to adjournment.
Present: Same court.

In re the Estate of GEORGE WASHINGTON, a Minor, Heir of Susan Whitefeather, Deceased; Jonathan Gore, Guardian.

17 *Petition to Sell Real Estate.*

Now comes Jonathan Gore, guardian of George Washington, a minor heir of Susan Whitefeather, deceased, and presents his petition praying for an order of sale of the following real estate, to-wit:

The northwest quarter of section twenty-nine (29)—160 acres; also the southeast quarter of the northwest quarter of section thirty (40 acres), all in township 11 (eleven) south of range twenty-five

(25), east of the sixth principal meridian in Kansas, containing two hundred acres as the property of said minor on examination whereof the court doth find from the facts set forth in said petition and other evidence adduced that said minor is not possessed of any personal property that can be appropriated to his proper use and benefit, and that said land is unproductive and from which said minor receives no income; that said land is timber land, and subject to waste by reason of trespass, and that it is necessary that said land should be sold for the benefit of said minor and that said land can be sold better at private sale than at public. And it further appearing that said guardian hath given legal notice to said minor of this application for the sale of said lands and that said guardian hath given additional security to the satisfaction of this court.

It is therefore ordered that the said guardian do sell all the right, title and interest of said minor in and to said real estate for cash at probate sale and that he make return of his proceedings to this court.

B. P. NOTEMAN,
Probate Judge.

STATE OF KANSAS, }
County of Johnson, } ss:

In Probate Court of Johnson County, Kansas.

Petition.

To B. P. Noteman, probate judge of Johnson county, Kansas:

Your petitioner, Jonathan Gore, would most respectfully represent and show to this honorable court:

1st. That he is guardian of George Washington, minor heir of Susan Whitefeather, deceased.

2nd. Your petitioner is a resident of the county of Johnson, Kansas. That said ward is temporarily absent from said county; that said ward as heir of said deceased is possessed of the land as described in accompanying notice.

3rd. Your petitioner further represents that said ward is not possessed of any personal property that can be appropriated to his proper use and benefit.

4th. That said ward has land that to him is unproductive and from which he receives no income. The land is timber land and subject to waste by reason of trespass, and that it is necessary that the land should be sold for the benefit of said ward. Wherefore your petitioner prays this honorable court that an order may issue to your petitioner to sell the land above described at private sale, that the same can be better sold at private sale than at public.

JONATHAN GORE, *Guardian.*

STATE OF KANSAS, } ss:
County of Johnson, }

Jonathan Gore of lawful age, *who* first having been duly sworn according to law says he is the within petitioner and the facts set forth are true in substance and in fact.

JONATHAN GORE, *Guardian.*

Sworn and subscribed to before me this 2nd day of March, A. D. 1869.

B. P. NOTEMAN,
Probate Judge.

Notice.

To George Washington, minor heir:

You are hereby notified that on the 2nd day of March, A. D. 1869, or as soon thereafter as the same can be heard, I shall apply to the probate court of Johnson county, Kansas, to be held in Olathe in said county and State, by petition, a copy of which is hereby attached for an order to sell the following land, to-wit: The northwest quarter of section twenty-nine (160 acres); also the southeast quarter of the northwest quarter of section thirty (30) forty acres, all in township eleven, south of range twenty-five, east of the sixth principal meridian in Wyandotte county, Kansas, containing two hundred acres, where and when you can attend and make defense if you think proper.

18

Given under my hand this 17th day of Feb., A. D. 1869.

JONATHAN GORE, *Guardian.*

STATE OF KANSAS, } ss:
County of Johnson, }

Jonathan Gore, of lawful age, *who* first having been duly sworn according to law says that he served a true copy of the within notice and petition on George Washington by delivering the same to him on the 17th day of Feb. A. D. 1869.

JONATHAN GORE, *Guardian.*

Sworn and subscribed to before me this 2nd day of March, 1869.

B. P. NOTEMAN,
Probate Judge.

Filed March 2nd, 1869.
B. P. NOTEMAN,
Probate Judge.

Know all men by these presents, that Jonathan Gore, as principal and S. M. Cornatzer, J. A. Walker as sureties are held and firmly bound to the State of Kansas for the use of George Washington (minor heir) in the penal sum of four thousand dollars, lawful

money of the U. S. *States*, — which payment well and truly to be made we bind ourselves, our heirs, assigns and legal representatives, jointly, firmly and severally by these presents.

The conditions of the above bond is this: Whereas, the said Jonathan Gore has been duly appointed guardian of the person and property of George Washington, by the probate court of Johnson county, Kansas, and has filed his petition praying for an order to sell the northwest quarter of section twenty-nine (160 acres); also the southeast quarter of the northwest quarter of section thirty (30), 40 acres, all in township eleven (11), south of range twenty-five (25), east of the sixth principal meridian in Wyandotte Co., Kansas. Now if the said Jonathan Gore shall faithfully perform his duties in that respect and account for and apply all monies received by him under the direction of the court then this bond is to be void and of no force, otherwise to be and remain in full force.

JONATHAN GORE.
S. M. CORNATZER.
JAS. A. WALKER.

Approved and filed March 2nd, 1869.

B. P. NOTEMAN,
Probate Judge.

STATE OF KANSAS, }
County of Johnson, } ss:

We, the undersigned, two residents of the county of Wyandotte, State of Kansas, *having* been duly sworn according to law by Jonathan Gore, notary public in and for the county of Johnson, State of Kansas, to assess the following land:

The northwest quarter of section twenty-nine (29), and the northeast quarter of section 30; also the east half of the northwest quarter of section 30, all in township eleven (11), south of range 25, east of the sixth principal meridian, in Wyandotte county, Kansas, containing four hundred (400) acres. And we do from actual view of the above described land *we* assess the value thereof at $10.00 ten dollars per acre.

DAVID BLUEJACKET.
JONATHAN SPARLIN.

I hereby certify that the above named David Bluejacket and Jonathan Sparlin, two residents of the county of Wyandotte, State of Kansas, were duly sworn by me to truly assess the value of the above described land, and made apprais-ment thereof as above set forth this 13th day of February, A. D. 1869.

JONATHAN GORE,
Notary Public. [SEAL.]

Filed March 2nd, 1869.
B. P. NOTEMAN,
Probate Judge.

STATE OF KANSAS, } ss:
County of Johnson, }

19 In Probate Court, Johnson County, Kansas.

Jonathan Gore, guardian of George Washington, minor of Susan Whitefeather, "deceased," comes and reports that on the 3rd day of March, A. D., 1869, in obedience to the order of this court made at its January term of A. D. 1869, directing me to sell at private sale the following real estate, to-wit: the northeast quarter of section 29, and the southeast quarter of the northwest quarter of section 30, township eleven, south of range 25, east of the sixth principal meridian in Wyandotte county, containing two hundred acres, I did on the 3rd day of March, A. D. 1869, sell the above mentioned real estate at private sale to Joel F. Kinney for two thousand dollars, that being the best and highest price offered for said land.

JONATHAN GORE, *Guardian.*

STATE OF KANSAS, } ss:
County of Johnson, }

Jonathan Gore, of lawful age, *who* first having been duly sworn according to law, says the above report is true and that he did not direct- or indirectly purchase any part of said land—and that the price paid was the highest price offered for the same.

JONATHAN GORE.

Sworn and subscribed to before me this — day of ——, A. D. 1869.

—— ——.

Filed March 18th, 1869,
B. P. NOTEMAN,
Probate Judge.

Probate Court, Johnson County, State of Kansas, Jan'y Term, A. D. 1869.

MARCH 18TH, 1869.

Court met pursuant to adjournment,
Present: Same court.

In re the state of GEORGE WASHINGTON, "a Minor of Susan Whitefeather, Deceased"; Jonathan Gore, "Guard."

Report of Sale of Real Estate.

Now comes Jonathan Gore, guardian of the property of George Washington, a minor heir of Susan Whitefeather, deceased, and reports to this court his sale of the following real estate, to-wit: the

northwest quarter of section 29, and the southeast — of the northwest quarter of section 30, township 11, south of range 25, east of the 6th principal meridian in Kansas, containing 200 acres as the property of said minor in obedience to the order heretofore made.

On examination whereof it appearing that said sale is regular and in conformity with law and that said guardian hath complied with the terms of said order and that the price that said land was sold for was the highest that could be obtained,

It is therefore ordered that said sale be and it is hereby approved and confirmed.

B. P. NOTEMAN,
Probate Judge."

Jol. "2," page 395.

It is further understood and agreed that the following is a correct copy of the records of the Department of the Interior, and Office of Indian Affairs of the sale of the northwest quarter of section 29 (160 acres); also the southeast quarter of the northwest quarter of section 30 (40 acres), all in township 11, south of range 25, east of the sixth principal meridian, and in Wyandotte county, Kansas, by Jonathan Gore, guardian of George Washington, a minor, to Joel F. Kinney, to-wit:

20 "DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *July* 20, 1896.

I, D. M. Browning, Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear of record in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above written.

D. M. BROWNING,
Commissioner.

"Know all men by these presents, that I, George Washington, a Shawnee Indian minor heir and sole heir of Susan Whitefeather deceased, by my guardian Jonathan Gore of the county of Johnson, State of Kansas, for and in consideration of the sum of two thousand dollars to me paid, on the date of these presents, the receipt whereof is hereby acknowledged do by these presents grant, bargain, sell and convey unto Joel F. Kinney of Kansas City, county of Jackson, State of Missouri, the following described land, to-wit:

The northwest quarter of section twenty-nine (29) 160 acres; also the southeast quarter of the northwest quarter of section thirty (30) 40 acres—all in township eleven (11), south of range twenty-five (25), east of the sixth principal meridian in Kansas, containing two hundred acres. To have and to hold the same unto the said Joel

F. Kinney and to his heirs and assigns, and the said George Washington, by his guardian Jonathan Gore covenant-, to and with the said Joel F. Kinney and his heirs and assigns that the said premises are free from all encumbrances whatsoever and that I will warrant and defend the title of the said premises against the lawful claims of all persons whomsoever except the United States.

In witness whereof, I have hereunto set my hand and seal this 14th day of October, A. D. 1868.

GEORGE WASHINGTON, [SEAL.]
By his guardian, JONATHAN GORE. [SEAL.]

Witness-:
W. H. WALTER.
JAS. B. ABBOTT.

STATE OF KANSAS, }
Shawnee Agency, County of Johnson, } ss:

On this 14th day of October A. D. 1868 before me a U. S. Indian agent in and for said tribe came George Washington a Shawnee Indian by his guardian Jonathan Gore to me personally known to be the identical person described in, and whose name is affixed to the above conveyance as grantor and acknowledged the same to be his own voluntary act and deed.

Witness my hand the day and year last above written.

H. L. TAYLOR,
U. S. Ind. Agent.

SHAWNEE AGENCY, *November 6th*, 1868.

I, H. L. Taylor, United States agent for the Shawnee tribe of Indians in the State of Kansas, do hereby certify that the contents purport and effect of the accompanying deed of conveyance made, and executed by George Washington by his guardian Jonathan Gore a Shawuee Indian, was duly explained to and fully understood by the said grantor; that the consideration specified therein is a fair price for the land, that the same has been paid to the grantor in my presence in legal tender notes of the United States, and that the conveyance is in every respect free from fraud and deception.

Witness my hand this 6th day of November A. D. 1868,

H. L. TAYLOR,
United States Agent.

SHAWNEE AGENCY.

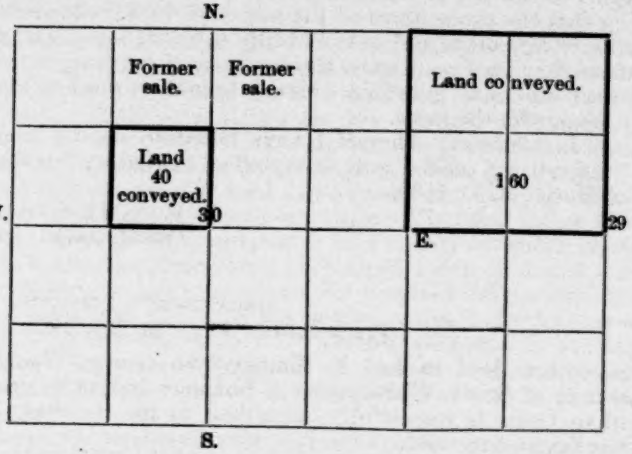
We, Graham Rogers and Charles Tucker the two chiefs of the Shawnee nation do hereby certify that George Washington is
21 the sole heir of Susan Whitefeather (deceased) Shawnee Indian that said George Washington is a minor and not com-

petent to manage his affairs, but Jonathan Gore his guardian is competent, and that the price paid is a fair consideration for the land and we think it advisable that the land should be sold.

GRAHAM ROGERS, *1st Chief.*
CHARLES TUCKER, *2nd Chief.*

Plat.

Showing the land conveyed by George Washington, minor, sole heir of Susan Whitefeather (dec'd), Shawnee Indian, to J. F. Kinney; also showing the land previously conveyed in same section by the said Geo. Washingyon, minor heir.



The N. W. ¼ of sec. 29; the S. E. ¼ of the N. W. ¼ of sec. 30, township 11, south, range 25 east of the sixth principal meridian in Kansas containing in the aggregate 200 acres.

I, Chester Rathruff, do hereby certify that the foregoing diagram is a correct plat of the land embraced in the accompanying deed, made and executed by George Washington minor and a Shawnee Indian, also of the land previously sold by the said Geo. Washington.

Dated this 14th day of October, A. D. 1868.

CHESTER RATHRUFF, *Surveyor.*

STATE OF KANSAS, }
County of Johnson, } *ss:*

I, B. P. Noteman, judge of the probate court for and within the county and State aforesaid do hereby certify that on the 27th day of November A. D. 1867 Jonathan Gore was appointed guardian of the person and property of George Washington a minor heir, and

Shawnee Indian—and that at the January term A. D. 1869 of said court to-wit: on the 2nd day of March A. D. 1869, the said guardian filed his petition praying for an order to sell the following real estate as the property of said minor to-wit: the northwest quarter of section twenty-nine, the southeast quarter of the northwest quarter of section thirty, all in township eleven, south of range twenty-five east of the 6th principal meridian in Kansas. And upon the hearing of said petition and the evidence in the case, and order was made by said court for the sale of the above described real estate, and at the January term A. D. 1869 of said court, the said guardian made his report of the sale of the above described real estate, and it appearing that the proceedings of the sale were in accordance to the order heretofore made and in conformity with the law. The sale of the above described real estate, was by the said court approved and confirmed, and said guardian ordered to make a deed to the purchaser for the same.

22 In testimony whereof I have hereunto set my hand and affixed my official seal, at my office in Olathe, this the 19th day of March, A. D. 1869.

B. P. NOTEMAN,
Probate Judge. [SEAL.]

DEPARTMENT INTERIOR,
OFFICE INDIAN AFFAIRS, *May 19th*, 1869.

The within deed to Joel F. Kinney from George Washington minor heir of Susan Whitefeather a Shawnee Indian by guardian Jonathan Gore, is respectfully submitted to the Secretary of the Interior for his approval.

E. L. PARKER,
Commissioner.

DEPARTMENT INTERIOR, *May* 21, 1869.

The within deed is hereby approved.

J. D. COX, *Secretary.*

It is further agreed that the following is a true and correct copy of the records of the probate court of Wyandotte county, State of Kansas, in the appointment of Elizabeth Longtail as the guardian of George Washington, minor heir of Susan Whitefeather, a Shawnee Indian:

"Guardianship of George Washington—Petition for Appointment."

Filed July 10, 1862.

In the Probate Court, Wyandotte County, State of Kansas.

In the Matter of the Appointment of Guardian for GEORGE WASHINGTON, a Minor under the Age of Fourteen Years.

To the judge of said court:

The undersigned respectfully represent that George Washington is a minor under the age of fourteen years, resident in said county, that his father and mother are both dead and he is the only surviving child. That your petitioners are brother and sister of the deceased mother of said infant and at the time of the decease of the mother of said infant your petitioner Elizabeth Longtail took the said infant unto her care and custody and has kept him from that time to the present about six years. That said infant has four hundred acres of land situated in said county of which about ten acres is under improvement with a small cabin on it and has personal property to the amount of four hundred dollars and that the annual rents and income of the said ten acres under improvement is worth twenty-five dollars. That his property is so situated it requires the care and judgment of a person of mature years and that said Elizabeth Longtail is a suitable person to be guardian of said infant.

Whereupon your petitioner requests your honor to appoint Elizabeth Longtail guardian of the said George Washington.

his
JACOB x WHITEFEATHER.
mark.

her
ELIZABETH x LONGTAIL.
mark.

WYANDOTTE COUNTY, *State of Kansas,* } ss:

23 Jacob Whitefeather and Elizabeth Longtail, being first duly sworn says the facts stated and matters and things contained in the above petition are true as they verily believe.

his
JACOB x WHITEFEATHER.
mark.

her
ELIZABETH x LONGTAIL.
mark.

WYANDOTTE COUNTY, } ss:
State of Kansas, }

Subscribed in my presence and sworn to before me this 9th day of July A. D. 1862.

JOHN M. FUNK, *J. P.*

Application of Jacob Whitefeather et al. for Guardian for George Washington.

Bond.

I approve of this within bond and surety this 10th day of July 1862.

E. D. BROWN,
Judge of Probate.

Recorded in Administration Record, page 210.

E. D. BROWN,
Judge of Probate.

Filed July 10, 1862.

In the Matter of Appointment of Guardian of GEORGE WASHINGTON, a Minor under the Age of 14 Years.

In Probate Court, Wyandotte County, State of Kansas.

Whereas the judge of probate court for Wyandotte county has appointed Elizabeth Longtail guardian of George Washington, an infant under the age of fourteen years. Now be it known that we, Elizabeth Longtail as principal and Jacob Whitefeather as surety are held and firmly bound unto the State of Kansas in the full just sum of — dollars that the said Elizabeth will faithfully discharge her duties as such guardian according to law.

Signed with our seals and dated this 9th day of July A. D. 1862.

her
ELIZABETH x LONGTAIL. [SEAL.]
mark.

his
JACOB x WHITEFEATHER.
mark.

Signed and sealed in the presence of

A. B. BARTLETT.

Jacob Whitefeather being sworn says he has property above all executions and debts to an amount exceeding two thousand dollars.

his
JACOB x WHITEFEATHER.
mark.

WYANDOTTE COUNTY, } ss:
State of Kansas, }

Subscribed and sworn to in my presence before me this 9th day of July, 1862.

JOHN M. FUNK, *J. P.*

Offer of Elizabeth Lon-tail in Matter of Application of Guardian for George Washington.

Oath of guardian.

Filed July 10, 1862.

STATE OF KANSAS, } ss:
Wyandotte County, }

Elizabeth Longtail being first duly sworn deposes and says that she will faithfully discharge her duties as guardian of George Washington an infant according to law.

her
ELIZABETH x LONGTAIL.
mark.

24 WYANDOTTE COUNTY, } ss:
State of Kansas, }

Subscribed in my presence and sworn to before me this 9th day of July, A. D. 1862.

JOHN M. FUNK, *J. P.*

It is further understood and agreed that plaintiffs herein claim title to the lots as set forth in their petition herein through the deed set forth above and dated October 14th, 1868, said conveyance of said land in which said lots are located being made by Jonathan Gore as guardian of George Washington, a minor, and Shawnee Indian, to Joel F. Kinney; and that said deed is the only deed to said land in which said lots are located that has been approved by the Interior Department at Washington, D. C.

It is hereby agreed that the record filed in the supreme court of the State of Kansas, in the case of Hannon *vs.* Taylor, and which case is reported in 45 Pacific Reporter 51, contains the laws of the Shawnee tribe of Indians, and that the following is a true and correct copy of said laws, which laws have been in effect since the year 1854, or since their enactment at about that time, or a true and correct copy of article 5 of said Shawnee laws, to-wit:

"Article 5. An act authorizing the appointment of guardians, for insane persons and orphan children.—Be it enacted by the national council that in addition to the duties of councillors, they shall be required and authorized to appoint guardians for insane and incom-

petent persons and also for all minor orphan children on application being made by some competent and responsible person, or persons for that purpose. The guardian or guardians so appointed shall be required to render a schedule of all monies, property and other effects, belonging to such insane person or persons or orphan or orphans, and at least once annually hereafter such guardian or guardians shall be required to give bond and security in a sum double the amount of the value of the property or money or other effects agreeably to the schedule rendered in by such guardian or guardians made payable to the council or their successors in office for the faithful discharge of his, her, or their duty as guardian or guardians.

Be it further enacted that the property or other effects belonging to such insane or incompetent person or orphan shall be valued by at least two disinterested persons, and that the council shall be required to record all such bonds and schedules.

It is further agreed that the following is a true and correct copy of the final settlement of Jonathan Gore, guardian of George Washington, minor heir of George and Judy Washington, as recorded in the probate court of Johnson county, Kansas, to-wit:

25 In the Probate Court, Johnson County, Kansas.

"In the Matter of the Estate of GEORGE WASHINGTON, a Minor Heir of George and Judy Washington, Dec'd.

And now comes the above named George Washington and moves the court for a citation against Jonathan Gore, guardian of the person and property of George Washington, heir of George and Judy Washington, deceased, requiring the said Gore to make his final settlement with said George Washington and pay to his said ward, or into court all moneys that may be due him from said guardian, for the reason that said George Washington is no longer a minor, but is of lawful age, that is more than twenty-one years of age.

WINES AND OGG,
For Washington.

(Endorsed on back:) Motion for citation, Jonathan Gore, guardian of George Washington minor. Filed April 21, 1875, G. F. Hendrickson, probate judge.

Citation to Jonathan Gore, Guardian, for Annual Settlement.

Issued April 21st, 1875. Filed April 23rd, 1875. G. F. Hendrickson, Probate Judge.

THE STATE OF KANSAS, } ss:
Johnson County, }

To Jonathan Gore, guardian of the person, estate, and property of George Washington, minor heir of George and Judy Washington, deceased:

You are hereby notified, that you are required to appear before the probate court, in and for said county of Johnson and State of Kansas, on the 12th day of May, A. D. 1875, the same being the April term of said court then and there to make your final settlement as guardian of the person and property of the above named minor, he being 21 years of age. Hereof fail not, under the penalties of law.

In witness whereof, I, G. F. Hendrickson, judge and *ex-officio* clerk of the probate court of Johnson county, Kansas, have hereunto set my hand and affixed the seal of said court this 21st day of April, 1875.

G. F. HENDRICKSON,
Probate Judge.

To the sheriff of Johnson county.

Jonathan Gore, Guardian of George Washington—Settlement.

Filed Nov. 29th, 1870. B. P. Noteman, Probate Judge.

OLATHE, KANSAS, *January* 24, 1870.

Received of Jonathan Gore the sum of fifty dollars.

his
GEORGE x WASHINGTON.
mark.

GRAHAM ROGERS.

KANSAS CITY, MO., *January* 3rd, 1873.

Mr. Col. Gore to Strouse & Bros.

Mdse. for George Washington $52.35

Received payment,

STROUSE & BROS.

KANSAS CITY, *Nov. 26th*, 1870.

Mr. George Washington bought of W. E. Whiting & Co., merchant taylors.

To coat..... $45.00

Received payment of Jonathan Gore in full.

W. C. WHITING.

Holmes & Dean, pay to George Matney one hundred and fifty dollars of money you collect of Jonathan Gore my guardian and interest thereon at 10 per cent. till paid.

his
GEORGE x WASHINGTON.
mark.

Sept. 25th, 1873.

Attest: HENRY F. A. ROGERS.

26 We accept to pay above when collected of Gore. Sept. 25, 1873.

HOLMES & DEAN.

K. CITY, Mo., *Nov. 21st*, 1874.

Friend Gore, you recollect George Washington gave me Geo. Matney an order on us Sept. 25th, 1873, for one hundred and fifty (150)—which we accepted when collected of you. You paid us ninety dollars thereon, May 9th, 1874. The balance due thereon with interest to this date is seventy-three and 07/100 dollars. Pay me Matney this amount $73.07, and this shall be your receipt for that amount.

HOLMES & DEAN,
Att'ys for Geo. Washington.

OLATHE, *February 16th*/69.

Received of Jonathan Gore, guardian of George Washington, $7.50 for probate fee in order of sale on real estate made on M'ch 2nd, 1869.

B. P. NOTEMAN,
Probate Judge.

SHAWNEE, KANSAS, *Nov. 24th*, 1870.

Rec. of Jonathan Gore, thirty-seven dollars and fifty cents in full for bill clothing bought for George Washington Nov. 18th, 1870. $37.50.

J. A. WALKER.

SHAWNEE, KANSAS, *May 10th*, 1875.

Jonathan Gore bought of S. M. Cornatzer.

For 1874. April 11, one pair calf shoes, $3.00; one cotton pair hose, .25; 4 plugs tobacco, $1.00; April 21, 2 plugs tobacco, .50; May 4, 1874, 1 plug tobacco, .25; May 4, 1874, cash per order J. Gore, $1.35; Dec. 24, 1874, cash per order J. Gore, $6.50. Whole amount assumed, $12.85, for George Washington, a Shawnee Indian.

SHAWNEE, KANSAS, *Nov.* 24/70.

Rec. of Jonathan Gore seven dollars & fifty cents for clothing for George Washington, bo't to-day. $7.50.

J. A. WALKER.

Received of Jonathan Gore the sum of two hundred dollars. Olathe, Dec. 29th, 1869.

his
GEORGE x WASHINGTON.
mark.

Witness:
GRAHAM ROGERS.

OLATHE, KANSAS, *April 13th*, 1870.

Rec'd two hundred dollars of Jonathan Gore.

his
GEORGE x WASHINGTON.
mark.

Witness:
R. S. ROBERTS.

Received of Jonathan Gore the sum of two hundred & fifty dollars. Shawnee, Kansas, Sept. 8th, 1868.

his
GEORGE x WASHINGTON.
mark.

Witnesses:
SUSAN DAUGHERTY.
J. A. WALKER.

OLATHE, KANSAS, *Feb. 15th*, 1870.

Received of Jonathan Gore the sum of fifty dollars.

his
GEORGE x WASHINGTON.
mark.

Attest:
A. S. DEVENNEY.
JOHN M. GIFFIN.

$500.00. Received of Jonathan Gore the sum of five hundred dollars in part for money due me by him, as my guardian, Sept. 24th, 1873.

his
GEORGE x WASHINGTON.
mark.

Attest: WM. HOLMES.

27 Received at Olathe, March 25th, 1870, of Jonathan Gore the sum of two hundred dollars.

his
GEORGE x WASHINGTON.
mark.

S. W. HOITZKINS.

OLATHE, KANSAS, *April 9th*, 1870.

Received of Jonathan Gore the sum of one hundred dollars.

his
GEORGE x WASHINGTON.
mark.

Witness:
J. C. HAYS.

SHAWNEE, KANSAS, *March 1st*, 1869.

Rec'd of Jonathan Gore the sum of $30.00.

his
GEORGE x WASHINGTON.
mark.

Attest: J. A. WALKER.

Received of Jonathan Gore, one hundred and fifty dollars, on a claim of George Washington, against said Gore, as guardian of said Washington May 5th, 1874.

HOLMES & DEAN,
Att'ys for Geo. Washington.

Annual Statement of Jonathan Gore, Guardian of the Property of George Washington, Minor Heir, Made This 29th Day of November, A. D. 1870.

The estate:

	Cr.
1867—Dec. 10th—By sale of real estate.....	$400.00.
1868—April 8th—By sale of real estate.....	2000.00.
1868—March 18th—By sale of real estate.....	2000.00.
Total	$4400.00.

The estate:

	Dr.
1867—Nov.—To cash	$30.00.
" " probate fees	12.50.
" " att'ys' fees	20.00.
1868—July—To cash	240.00.
1869—March—To cash	30.00.
1868— " probate fees	12.50.
1869— " " "	12.50.
1869— " to H. McBride	6.00.
1869— " to fees serving summons & mileage	25.00.
1869— to making 3 Indian deeds	15.00.
1869—Dec.—To cash	200.00.
1870—To cash	50.00.
1870—To cash—Jan.	50.00.
1870— " —Feb.	100.00.
1870— " —April	200.00.
1870— " —March	200.00.
1870— " —April	45.00.
1870— " —Nov	2.50.
1870—Nov.—To overcoat	190.00.
Total amount	$1486.00

Recapitulation.

The estate, Cr.	$4400.00.
The estate, Dr.	1486.00.
Leaving a balance in the hands of said guardian...	2914.00.
Nov. 29th, 1870—To probate fees	5.00.
Balance due estate	$2909.00.

28 STATE OF KANSAS, } ss:
Johnson County, }

Jonathan Gore of lawful age being first duly sworn deposeth and saith that he is guardian of the property of George Washington, said minor heir, and that he has given all credits due said estate and accounted for all moneys that have come into his hands as such guardian of said estate, and that the charges and expenses against said estate are just and correct, and that the amount now remaining in his hands as such guardian, due said estate is $2909.00, and further deponent saith not.

JONATHAN GORE.

Subscribed in my presence and sworn to before me this 29th day of November, A. D. 1870.

B. P. NOTEMAN,
Probate Judge.

It is further agreed that George Washington, defendant herein, and son of Susan Whitefeather, deceased, and a Shawnee Indian, was made a citizen of the United States at Vinita, Indian Territory, before Judge Gill, United States circuit court judge of the northern district, Indian Territory, on September 26th, 1900.

It is further agreed that R. R. Dunbar has been in possession of the property in controversy herein for the past five years as the agent and tenant of said George Washington.

WOODS & MADLEM,
Attorneys for Plaintiffs.
BIRD & POPE,
Attorneys for Defendants.

In the District Court of Wyandotte County, Kansas.

SANFORD M. GREEN ET AL., Plaintiffs,
vs.
R. R. DUNBAR ET AL., Defendants. } No. 14636.

Supplemental Agreed Statement of Facts.

I. It is agreed that the land in controversy was vacant and unimproved up to the time R. R. Dunbar took possession of same as the agent of George Washington, one of the defendants herein.

II. It is hereby further agreed that whatever title to the land in controversy that was acquired by Joel F. Kinney, by the deed of Jonathan Gore, guardian, etc., to Joel F. Kinney etc., was by mesne conveyances vested in the plaintiffs herein.

F. M. WOODS AND
F. M. McHALE,
Attorneys for Plaintiffs.
BIRD & POPE,
Attorneys for Defendants.

29 Endorsed on the back: "No. 14636. Sanford M. Green *et al. vs.* R. R. Dunbar *et al.* Agreed statement of facts. Filed Nov. 19, 1900. A. Gunning, clerk."

And thereafter and on, to-wit: November 20, 1900, and in due time said defendants filed their answer in said cause, which was in the words and figures following, to-wit:

In the District Court of Wyandotte County, Kansas.

SANFORD M. GREEN, LUCRETIA L. GREEN, WILLIAM E. Green, and Effie Green, Plaintiffs,
vs.
R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHington, Allen F. Reed, Al. Payne, T. J. Payne, John Small, and George Dunbar, Defendants. } No. 14636.

Separate Answer and Cross-petition of the Defendants.

Come now the said defendants, R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. J. Payne, John Small and George Dunbar, and for their answer to the amended petition of the plaintiffs Sanford M. Green, Lucretia L. Green, William E. Green and Effie Green, filed herein, allege:

First. That they deny the truth of each and every statement, allegation and averment in said amended petition of the plaintiffs made or contained.

Second. Further answering and for their cross-petition herein, the said defendants R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. J. Payne, John Small and George Dunbar allege that they are the owners and in possession of the following described real property situate in Wyandotte county, Kansas, to-wit: Lots 18, 42, 43, 44, 45 and 47 in block 10; lots 8, 10, 11, 12, 13, 27, 28, 29, 30 in block 8; lots 18, 19, 20, 23, 24, 25, 35, 26, 36 in block 11; lot 9 in block 12; lots 33, 34 in block 13; lots 19, 20 in block 16; lots 20, 21 in block 19; lot 1 in block 7, all in Argentine Heights, an addition to the city of Argentine, Wyandotte county, Kansas, as shown by recorded plat in the register of deeds office in said county, and that said plaintiffs Sanford M. Green, Lucretia L. Green, William E. Green, and Effie Green, set up and make some claim of title thereto, which interferes with the sale of said property by the defendants, and places a cloud upon the title of the defendants to said real property. That said plaintiffs have, in fact, no title to said property whatever, and defendants demand judgment herein that their title and possession of said property be quieted as against the said claims of title of the plaintiffs, and that said plaintiffs be forever barred and enjoined from thereafter setting up or making any claim to said property whatever, and that defendants recover of and from the said plaintiffs their costs herein, and will the court grant such other and further proper relief as defendants may show themselves to be entitled to.

BIRD & POPE,
RIGGS, NEVISON & ALFORD,
Attorneys for Defendants.

Endorsed on back: "No. 14636. Sanford M. Green *et al.* plaintiffs, *vs.* R. R. Dunbar *et al.*, defendants. Separate answer and cross-petition of defendants. Filed Nov. 20, 1900. A. Gunning, clerk. Bird & Pope, Riggs, Nevison & Alford, attorneys for defendants."

* * * * * * *

31 And thereafter and on, to-wit: November 30, 1900, said plaintiffs filed reply to said answer and which is in the words and figures following, to-wit:

In the District Court of Wyandotte County, Kansas.

SANFORD M. GREEN, LUCRETIA L. GREEN, WILLIAM E. GREEN, and Effie Green, Plaintiffs,
vs.
R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, AL. Payne, T. J. Payne, John Small, and George Dunbar, Defendants.

Reply.

32 Comes now the said plaintiffs Sanford M. Green, Lucretia L. Green William Green and Effi- Green and for their reply to defendants' answer and cross bill deny each, every and all the material allegations in said answer set forth not expressly hereinafter admitted.

Second. Said plaintiffs deny that the said defendants have any right, title or interest in the said lands described in our amended petition and also described in the defendants' answer.

Wherefore the said plaintiffs pray judgment as set forth in their regular amended petition.

WOODS & MADLEM,
Attorney- for Plaintiffs.

Endorsed on back: "In the district court, Wyandotte county, Kansas. 14636. Reply. Sanford M. Green, Lucretia L. Green, William E. Green and Effie Green, plaintiffs, *vs.* R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al Payne, T. J. Payne, John Small and George Dunbar, defendants. Filed Nov. 30, 1900, A. Gunning, clerk."

And thereafter and on, to-wit: December 14, 1901, the court having duly considered of his decision and judgment in said cause, and the briefs of counsel duly siled therein rendered judgment in favor of the plaintiffs and against the defendants, and the journal entry thereof is found in Journal 26 at page — and is in the words and figures following, to-wit:

33–45 DECEMBER 14, 1901.

SANFORD M. GREEN, LUCRETIA L. GREEN, WILLIAM E. Green, and Effie Green, Plaintiffs,
vs.
R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHington, Allen F. Reed, Al. Payne, T. J. Payne, John Small, and George Dunbar, Defendants. } No. 14636.

And now on this December 14, 1901, the court having taken under advisement the above entitled action and the agreed statement of facts and the supplement agreed statement of facts herein, and the briefs of counsel, duly filed herein, doth find for the plaintiffs and against the defendants, and that at the time of the commencment of this action the plaintiffs were the owners and entitled to the immediate possession of the following described real property situate in Wyandotte county, State of Kansas, to-wit: Lots 18, 42, 43, 44, 45 and 47 in block 10; lots 10, 11, 12, 13, 27, 28, 29, 30 in block 8; lots 18, 19, 20, 23, 24, 25, 26, 35, 36 in block 11; lot 9 in block 12; lots 33, 34, in block 13; lots 19, 20 in block 16; lots 20, 21 in block 19; lot 1 in block 7; all in Argentine Heights, an addition to the city of Argentine, and that said defendants wrongfully withheld the possession of said property *of said property* from said plaintiffs, defendants duly excepting.

It is by the court accordingly ordered, adjudged and decreed that the plaintiffs do have and recover from said defendants the possession of said property hereinbefore described, and in controversy herein, together with their costs herein, taxed at the sum of $—, and for all of which let execution issue, defendants, and each thereof, duly excepting.

And for good cause shown time is extended to ten days (10) herefrom for said defendants to make and serve a case-made herein for the supreme court, and defendants to have ten (10) days therertfea in which to suggest amendments thereto, and said case-made to be settled on five (5) days' notice by either party.

The value or amount in controversy in the above entitled action, exclusive of interest and costs exceeds the value of one hundred dollars ($100.00).

* * * * * * *

46 In the Supreme Court of the State of Kansas.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHington, Allen F. Reed, Al. Payne, T. H. Payne, John Small, and George Dunbar, Plaintiffs in Error,
vs.
SANFORD M. GREEN, LUCRETIA L. GREEN, WILLIAM E. Green, and Effie Green, Defendants in Error.
} No. 13005.

Revivor of Action by Consent.

Come now the above named plaintiffs in error, R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. H. Payne, John Small and George Dunbar, and suggest to the court that the defendant in error, Sanford M. Green, has died since this action was appealed to the supreme court of Kansas.

And come now said defendants in error, Lucretia L. Green, William E. Green and Effie Green, and also come Lina Hill, Fannie E. McHale and Lottie De Wit, and state that they are the sole heirs of said Sanford M. Green.

It is therefore stipulated and agreed by the plaintiffs in error, and by said defendants in error Lucretia L. Green, William E. Green and Effie Green and said Lina Hill, Fannie E. McHale and Lottie De Wit, that revivor may be had herein and that this action stand revived in the names of said Lucretia L. Green, Effie Green, William E. Green, Lina Hill, Fannie E. McHale and Lottie De Wit, and proceed against them.

F. M. McHALE,
Att'y for Defendants in Error.
Attorneys for Defendants in Error.
BIRD & POPE,
Attorneys for Plaintiffs in Error.

46½–54 [Endorsed:] 13005 R. R. Dunbar *et al. vs.* Sanford M. Green *et al.* Consent to revivor against the heirs of Sanford M. Green. Filed Jan. —7—1903 D. A. Valentine clerk supreme court.

55 & 56 R. R. DUNBAR ET AL., Pl'ffs in Error,
vs.
SANFORD M. GREEN ET AL., Def'ts in Error.
} No. 13005.

Journal Entry of Judgment.

This cause comes on for decision: And thereupon it is ordered and *and* adjudged that the judgment of the court below be *affirmed.* It is further ordered that the plaintiffs in error pay the costs of this case in this court taxed at $11.40 and hereof let execution issue

* * * * * * *

57 R. R. DUNBAR ET AL. v. SANFORD M. GREEN ET AL. } No. 13005. In Banc. Error from Wyandotte County. Affirmed.

Syllabus by the Court—Mason, J.

1. The fact that a litigant is a member of an Indian tribe does not release him from all obligation to be diligent in asserting his rights. While it is one of the matters to be considered with the other circumstances of a case in determining the effect of delay, it is not a complete bar to the defense of laches.
2. Where the land of a Shawnee Indian is sold while he is a minor, by a guardian appointed by a probate court, and the Indian after coming of age delays for more than 21 years to question the validity of the deed, and the property has in the meantime greatly increased in value and passed into the hands of different owners, no fraud or concealment or other exceptional circumstances tending to excuse the delay being shown, he cannot afterwards be permitted to attack the deed on the ground that the proceedings upon which it was based were void for want of jurisdiction.

All the justices concurring.

A true copy.
Attest:

_____,
Clerk Supreme Court.

58 R. R. DUNBAR ET AL. v. SANFORD M. GREEN ET AL. } No. 13005. In Banc. Error from Wyandotte County. Affirmed.

The opinion of the court was delivered by MASON, J.:

This proceeding originates in a controversy over the title to 32 lots forming parts of 8 different blocks in Argentine Heights, an addition to the city of Argentine, in Wyandotte county. The northwest quarter of section 29, in township 11, of range 25 (in which quarter section such lots are located) was patented by the United States on December 28th, 1859, to Susan Whitefeather, as a member of the Shawnee Indian tribe, under the provisions of the treaty of May 10, 1854. She died some time prior to July 10, 1862, and her son, George Washington, inherited such land. He remained a member of the tribe until September 26, 1900, when he was made a citizen of the United States. On November 27th, 1867, he being then over 14 years of age, the probate court of Johnson county appointed Jonathan Gore as his guardian. Gore, as such guardian, under authority of such court sold said quarter section of land (with an additional

tract of 40 acres) to Joel F. Kinney for $2000.00, executing to him a guardian's deed, which was approved by the Secretary of the Interior May 21, 1869. The title so acquired by Kinney to the property here involved has passed by a series of conveyances to the Greens, defendants in error. George Washington (who may be considered as the sole plaintiff in error, he alone claiming title) took no step to challenge the validity of the guardian's deed until June 25, 1895, when according to the agreed statement of facts upon which the case was submitted to the district court, R. R. Dunbar, another plaintiff in error, took possession of the land as his agent. The Greens brought an ejectment action. The Indian claimant answered asserting title in himself and asked for a decree against plaintiffs quieting his title. The district court decided in
59 favor of plaintiffs. Plaintiffs in error ask to have the judgment reversed upon the ground that the guardian's deed was void, for the reason (among others) that, the real estate being owned by a Shawnee Indian deriving title by descent from the original patentee, the probate court had no jurisdiction to appoint a guardian or to order its sale. They further contend that so long as George Washington retained his character as a tribal Indian no statute of limitations ran against him, he could not be estopped by his conduct, and no laches could be imputed to him. No brief has been presented or argument made in this court in behalf of defendants in error.

We shall assume for the purposes of this case that the guardian's deed was void for want of jurisdiction. It is not claimed that it was tainted by any fraud or that it was in contravention of any statute. It seems to be virtually conceded that in the case of an ordinary litigant inaction for so long a time would constitute an effective bar to the assertion of a claim to the land, regardless of any statute of limitation. It will be noted that George Washington must have reached the age of 21 years before November 27, 1874. There was therefore an interval of more than 21 years after he attained his majority within which he did nothing to assert his title or to challenge the sufficiency of the guardian's deed. In the meantime we know without evidence that the property must have increased greatly in value and the record shows that it has been platted into city lots and sold in small parcels to different persons. The serious question for consideration then is whether a member of an Indian tribe may suffer a loss of property rights through laches, and if so to what extent his character as such affects the rule as applied in other cases.

At page 217 of volume 16 the American & English Encyclopedia of Law (2d edition) under the title "Indians," and also at page 108 of volume 18 of the same work, under the title "Laches," it is stated as a general proposition that laches cannot be imputed to a tribal Indian. However, only two cases are cited in support of the statement. They are Laughton *v.* Nadeau, 75 Fed. 789, and Felix *v.* Patrick, 145 U. S. 317. In the very extensive brief filed by plaintiffs in error the only cases cited upon this specific proposition are the two just noted and Sheldon *v.* Donohue, 40 Kan. 346.

60 The last named case is not in point. There a Chippewa Indian held title to a tract acquired under a treaty providing that the land could not be sold or otherwise disposed of except to the United States or to the members of the tribe. While this treaty provision was still in force the Indian owner deeded the tract to a white man, who took possession and held it for sixteen years. The decision was that since the paramount Federal law prohibited the grantee from taking title, he could not indirectly build up one by adverse possession, estoppel, or any statute of limitations. The question of the degree of accountability for his conduct to which an Indian is subject was not involved and was not discussed.

The case of Laughton *v.* Nadeau, however, (decided in 1896 by Judge Foster) tends to support the contention of plaintiffs in error. There a conveyance was made without the approval of the Secretary of the Interior, the case being one where such approval was necessary to the passing of the title. The Indian owner was permitted to set aside the conveyance. In the opinion it is said—"No laches could be imputed to complainant while under disability as a tribal Indian. He and his land were under the control of the Government." This is all that is said upon the question of laches. It will be noted that the second sentence quoted seems to modify or at all events give the reason for the first. The phrase "disability as a tribal Indian" may be interpreted as having reference to the specific disability under the treaty to alienate the land, rather than to a general disability resulting from the mere fact of membership of an Indian tribe. However, we shall consider the authority of this case as against the decision of the trial court. From what has just been said it is obvious that the language quoted was used almost incidentally, the principal discussion being confined to other questions. It appears to have been based upon two decisions which the court had already cited in another connection. They are Wiggin *v.* Conelly, 16 S. C. R. 914, and Eells *v.* Ross, 12, C. C. A. 205. These cases merely affirm the power of the Government of the United States by consent of the Indian tribe to impose valid restrictions upon the alienation of lands patented to individual Indians, and throw no light upon the matter of laches unless it may be
61 through references in general terms to such individuals being for the purposes there involved under the charge and care of the nation and tribe.

The case of Felix *v.* Patrick, above cited, we construe as an authority against the contention of plaintiffs in error that a tribal Indian cannot be guilty of laches. It is a review of Felix *v.* Patrick, 36 Fed. 457, decided in 1895 by Judge Brewer, Judge Dundy participating in the hearing. The suit involved a tract of land within the city of Omaha. The title of the occupants was based in the first instance upon a fraud perpetrated upon an Indian, whose heirs sought in effect to recover the land by having the title originally taken by fraud, and all titles derived through it, impressed with a trust for their benefit. A demurrer to the complaint was sustained.

The opinion, after stating that the two principal grounds of demurrer were as to the effect of a certain act of Congress and the staleness of plaintiffs' claim, and after discussing such statutory question, proceeds as follows:

"But in such cases equity will recognize the defense of laches and staleness of claim, under proper circumstances, and this is a case where it seems eminently proper to recognize and enforce such a defense. Under ordinary circumstances it does not seem probable that any one would seriously contend that a claim so stale could be enforced, or that equity would take property which had increased so enormously in value after this lapse of time, and give it to parties who had done nothing toward such enhancement of value. But it is earnestly contended that a different rule should be applied in this case, because plaintiffs and their ancestors were Indians; that the law is very tender in respect to the rights of such persons who are not familiar with our laws and methods of transacting governmental or private business, and were ignorant of the disposition which had been made of the scrip. And it is also urged that as Indians they were the wards of the Government, and could not have asserted their rights to the property even if they had known what their rights were. It is not shown that they were not persons of education and intelligence, or that they were not in fact familiar with the land laws, and the methods of governmental business, or that they were not in fact as competent to look after their rights as any persons. We all know that many of these Indians, especially half-breeds, are well educated, intelligent, and as fully competent to look after their business affairs as any persons; and the fact that they were Indians, and maintaining tribal relations, and were in a certain sense the wards of the Government, did not debar them from a hearing in the courts of Nebraska. * * * At any time during the last 27 years these plaintiffs or their ancestors could have come into the courts of Nebraska and asserted their rights, and, as this scrip was of value simply for the entering of lands, they could at any time, by examining the records at Washington, have ascertained whether it had been used and by whom, and where the land for which it had been used was located. The means of knowledge were open before them. They had the right to sue, and the courts would have given them full protection. It would savor little of equity to permit them to come in now and take from these many defendants, most of whom are innocent of any intentional wrong, property of such enormous value, on the ground that their ancestor 28 years ago was swindled out of script of such trifling value,—a million dollars to-day for one hundred and fifty dollars twenty eight years ago, I cannot believe that equity demands or even tolerates this. The demurrer will be sustained."

62 Upon the appeal the supreme court affirmed the decree of the circuit court. The opinion, after stating that there were really but two questions involved in the case, one being whether

plaintiffs were estopped by laches, and after discussing the other question, proceeds as follows:

"The most important question in this case, however, the question upon which its result must ultimately depend, is that of laches. * * * It admits of no doubt that if Sophia Felix and these plaintiffs had been ordinary white citizens, under no legal disabilities, such as those arising from infancy, lunacy or coverture, this lapse of time would be fatal to a recovery; at least unless it were conclusively shown that knowledge of the fraud was not obtained, and could not by reasonable diligence have been discovered, within a reasonable time after it was perpetrated. In reply to this defense of laches, plaintiffs rely mainly upon the fact that Sophia Felix and her heirs were at the time, and continued to be until 1887, tribal Indians, members of the Sioux nation, residing upon the reservation in the State of Minnesota, and incapable of suing in any of the courts of the United States. We are by no means insensible to the force of this suggestion. Whatever may have been the injustice visited upon this unfortunate race of people by their white neighbors, this court has repeatedly held them to be the wards of the nation, entitled to a special protection in its courts and as persons "in a state of pupilage." Congress, too has recognized their dependent condition and their hopeless inability to withstand the wiles or cope with the power of the superior race, by imposing restrictions upon their power to alienate lands assigned to them in severalty, either by making their scrip non-assignable, as in this case, or by requiring the assent of the President to their execution of deeds as in the case of Pickering *v.* Lomax, *ante*, 310, decided at this term. We fully coincide with what was said by Mr. Justice Davis in the case of the Kansas Indians, 5 Wall. 737, 758, that "the conduct of Indians is not to be measured by the same standard which we apply to the conduct of other people." But their very analogy to persons under guardianship suggests a limitation to their pupilage, since the utmost term of disability of an infant is but 21 years, and it is very rare that the relations of guardian and ward under any circumstances, even those of lunacy, are maintained for a longer period than this. It is practically admitted in this case, that, in 1887, when their relations with their tribe were severed by accepting allotments of land in severalty under the treaty of 1878, they became citizens of the United States; that they were then chargeable with the same diligence as white people in the discovery of this fraud; and, as their bill was filed in 1888, it was claimed that they fulfilled all the requirements of law in this particular. While, as alleged in the bill, their discovery of this fraud may have been contemporaneous with their becoming citizens of the United States there is no palpable connection between the one fact and the other, and we think the bill is defective in failing to show how the fraud came to be discovered, and why it was not discovered before. A simple letter to the Land Department at any time after this scrip was located would have enabled them to identify the land, and the

name of the person who had located it; and it is difficult to see why, if they had ever suspected the misuse of this scrip, they had not made enquiries long before they did, or why their emancipation in 1887 should have suddenly awakened their diligence in this particular. * * * Sophia Felix and her husband must have known that she had parted with the scrip, yet she lived until 1865, and her husband until 1882, without apparently making any attempt to discover what had become of it. Nor did their heirs apparently make any effort to discover it until 1887 when their intelligence seems to have suddenly sprung into activity upon
63 their becoming citizens of the United States. It is scarcely necessary to say in this connection, that while until this time they were not citizens of the United States, capable of suing as such in the Federal courts, the courts of Nebraska were open to them as they are to all persons irrespective of race or color. * * * The mere fact that in 1887 these plaintiffs took their land in severalty and became citizens, does not adequately explain how they so quickly became cognizant of this fraud, or why they had remained so long in ignorance of it."

The opinion then presents a further argument to the effect that even conceding that the complainants were incapable of being affected with laches, it would not necessarily follow that they should have the relief demanded, but that equity would be satisfied with a repayment of the value of the scrip, the fraudulent procuring of which was the foundation of defendant's title. It concludes with a reference to the disastrous consequences that would attend the unsettlement of large numbers of titles "upon which the owners have rested in security for nearly a generation."

We quote thus extensively from this opinion in an effort to present practically all of it that directly affects the subject under consideration, in view of the fact that it has been cited as supporting the view that laches can not be attributed to a tribal Indian. In the brief of appellants in the Federal Supreme Court the following cases, and no others, were cited upon this question: Cherokee Nation *v.* Georgia, 5 Pet. 1, 17; Fellows *v.* Blacksmith, 19 How. 366; Kansas Indians, 5 Wall. 737; New York Indians, 5 Wall. 761; *Ex parte* Crow Dog, 109 U. S. 556; 568; Elk *v.* Wilkins, 112 U. S. 94, 111; United States *v.* Kagama, 118 U. S. 375, 383; Choctaw Indians *v.* United States, 119 U. S. 1. These cases have only the most remote application, and were doubtless invoked, in the absence of more direct authority, because they abound in expressions to the effect that Indians are the wards of the nation and are entitled to protection at the hands of the Federal Government. We conclude that the weight of judicial opinion is against the rule announced in Laughton *v.* Nadeau, above cited. See also in this connection Rubideaux *v.* Vallie, 12 Kan. 28; Hannon *v.* Taylor, 57 Kan. 1; Schrumpeher *v.* Stockton, 58 Kan. 758; S. C. 183, U. S. 290; Swartzel *v.* Rogers, 3 Kan. 374. And we also approve on principle the doctrine that the fact that a litigant

is a tribal Indian is not a complete bar to the defense of laches, although it is to be taken into account in
64–83 determining the effect of his inaction. Whenever this defense is invoked there must be a consideration of all the special circumstances of the case. The mere extent of the delay is one item to be considered; among others are,—any change of conditions, the intervention of the rights of third parties, the likelihood of other interests being affected by the delay, the presence of fraud and its character, the diligence required to discover it, and so on. The partial disability of a litigant resulting from his membership in an Indian tribe is merely one factor, to be considered with all the other features of the case, and given the weight to which it may be entitled, in reaching a conclusion consonant with the general rule. His being an Indian entitles him to more liberal treatment in the matter just so far as it is an indication of his inferior capacity. To hold this guarantees him the exact amount of special protection to which he is fairly entitled. To go further and hold that it gives him absolute immunity from the consequences of his own neglect would be to make it a means of injustice toward others rather than of protection to himself. Taking this view of the case we find no difficulty in affirming the judgment of the trial court. Apart from the mere fact of the claimant being an Indian there is nothing to excuse the delay in this case. The land was sold for a price that two Shawnee chiefs and an Indian agent certified to be fair; the Secretary of the Interior approved the sale; the owner received and retained certainly a part and presumably the whole of the purchase money; no fraud of any character is charged; there was no concealment; while the property directly involved in this litigation may not be very valuable, the determination of this case necessarily affects the title to two hundred acres of land now lying close to a great city and probably owned by many different individuals. Perhaps the consideration last stated is not one proper to be weighed at this time and in this proceeding, but it is one that need not be taken into account to reach a just decision. We conclude that notwithstanding that plaintiff was a Shawnee Indian, his inaction for 21 years under such circumstances was sufficient to preclude him from thereafter asserting a title to this land.

The judgment is affirmed.

All the justices concurring.

A true copy.

[Seal Supreme Court, State of Kansas.]

Attest:

D. A. VALENTINE,
Clerk Supreme Court.

84 In the Supreme Court of the United States of America.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, Allen F. Reed, Al. Payne, T. H. Payne, John Small, and George Dunbar, Plaintiffs in Error,
vs.
LUCRETIA L. GREEN, WILLIAM E. GREEN, EFFIE GREEN, Lina Hill, Fannie E. McHale, and Lottie De Witt, Defendants in Error.
} No. 200.

Stipulation.

It is hereby stipulated — agreed by and between the plaintiffs in error, and defendants in error, above named, that in the printing of the record herein that the following pages only of said record are to be printed, to-wit: Pages ten (10) to thirty-three (33) inclusive except bond for costs on page- 30–31; page forty-six (46); page fifty-five (55); pages fifty-seven (57) to sixty-four (64) inclusive.

L. F. BIRD AND
H. G. POPE,
Attorneys for Plaintiffs in Error.

L. F. BIRD, *Of Counsel.*

F. M. WOODS,
CHARLES F. HUTCHINGS,
Attorneys for Defendants in Error.

CHARLES F. HUTCHINGS, *Of Counsel.*

[Endorsed:] No. 200. 19257 In Supreme Court U. S., October term, 1904. R. R. Dunbar *et al.*, *vs.* Lucretia L. Green *et al.* Stipulation.

85 [Endorsed:] File No. 19,257. Supreme Court U. S. October term, 1904 Term No. 200. R. R. Dunbar *et al.*, pl'ffs in error, *vs.* Lucretia L. Green *et al.* Stipulation to omit parts of record in printing. Filed July 23, 1904

Endorsed on cover: File No. 19,257. Kansas supreme court. Term No. 200. R. R. Dunbar, Elizabeth Dunbar, George Washington, *et al.*, plaintiffs in error, *vs.* Lucretia L. Green, William E. Green, Effie Green, *et al.* Filed March 1st, 1904. File No. 19,257.

(19,257.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 200.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, ET AL., PLAINTIFFS IN ERROR,

vs.

LUCRETIA L. GREEN, WILLIAM E. GREEN, EFFIE GREEN, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 27, 1905.

In the Supreme Court of the United States, October Term, 1904.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, *et al.*, Plaintiffs in Error,
vs.
LUCRETIA L. GREEN ET AL., Defendants in Error. } No. 200.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiffs in error and the defendants in error, in the above entitled cause, that pages 65 to 83 inclusive of the record herein be printed, same being petition for rehearing and order denying the same, citation and service, writ of error, assignment of errors, clerk's certificate to transcript and return to writ of error, the same having been omitted by mistake of counsel, in the prior stipulation filed herein.

L. F. BIRD,
Of Counsel for Plaintiffs in Error.
C. F. HUTCHINGS,
Of Counsel for Defendants in Error.

[Endorsed:] File No. 19,257. Supreme Court U. S. October term, 1904. Term No. 200. R. R. Dunbar *et al.*, pl'ffs in error, *vs.* Lucretia L. Green *et al.* Stipulation to print additional parts of record. Filed Mar 2d, 1905.

And afterwards on the 1st. day of May A. D. 1903, there was filed in the office of the clerk of the supreme court of the State of Kansas, a petition for a rehearing which with the endorsements thereon is in words and figures following, to-wit:

In the Supreme Court of the State of Kansas.

R. R. DUNBAR ET AL., Plaintiffs in Error,
vs.
SANFORD M. GREEN ET AL., Defendants in Error. } No. 13005.

Petition for Rehearing.

Come now here the said plaintiffs in error, and show to the court that they are entitled to an order for a rehearing herein for the following reasons, to-wit:

The decision of the court is based upon a misconception of the facts of the case.

The court, in deciding this case assumes

(1.) That Jonathan Gore, as guardian of George Washington, sold the land in controversy to Joel F. Kinney *under the authority of the probate court of Johnson county, Kansas.*

(2.) That George Washington took no steps to challenge the validity of the guardian's deed to Joel F. Kinney until June 25, 1895, when, according to the agreed statement of facts, R. R. Dunbar took possession of the land as agent of George Washington, and

(3.) That it *was virtually conceded* that if George Washington was an ordinary litigant inaction on his part for over 21 years would constitute an effective bar to an assertion of a claim to the land, regardless of any statute of limitations.

Now the facts are that the deed from Jonathan Gore, guardian, to Joel F. Kinney, was not made under the *authority* of any court, but was made on October 14, 1868, which was about 5 months before the guardian petitioned the probate court for authority to sell the land. This is all set out and shown in the brief of the plaintiffs in error (pp. 6 and 7, paragraphs 8 and 10; p. 11, paragraph 7; p. 13, paragraph 3; p. 15, paragraph (*b*)).

The deed being absolutely and incurably void, no affirmative action on the part of George Washington was necessary to set it aside. Being a void, as distinguished from a merely voidable deed, it was, in effect, no deed at all, and being no deed at all no rights were directed by it, and no rights could be acquired by it. It was not binding on George Washington, nor did it bar him from any interest in the property. No action on the part of the defendants in error, *no inaction on the part of the plaintiff in error, George Washington,* no resulting equity in the hands of third persons, and more than all, no power residing in any legislative *or other department of the Government,* could invest it with any of the elements of juridical vitality.

The guardian's deed was made before the statute was enacted making guardian's deeds *prima facie* evidence of the regularity of the proceedings (act of 1883 amending sec. 18 guardian and ward act), and no presumptions are to be indulged in favor of the validity of the guardian's deed, or the regularity of the probate proceedings (Brief Plaintiffs in Error p. 16).

The deed being an absolutely void guardian's deed there was no necessity for any action to set it aside or have it canceled, and it was impotent to start any statute of limitations in its favor (Brief of Plaintiffs in Error p. 29), and the approval of such deed by the Secretary of the Interior did not have the effect of giving vitality to such absolutely void deed (Brief of Plaintiffs in Error pp. 16 and 17).

Such being the case there was no necessity of affirmative action by George Washington to set aside such void guardian's deed, and he could wait until his title was attacked, or some move was made by parties claiming under such deed to establish their title under it and that was just what he did in this case. George Washington is not the actor in this case. He did not begin this suit. He was attacked. The defendants in error, as the plaintiffs in the court below, brought eject-

ment against him, as they prevailed in that suit. The case was tried on an agreed statement of facts, and George Washington lost, and the defendants in error won. Now the defendants in error must have won *on the strength of their title* and not on the weakness of the title of George Washington, but the court, in its decision seems to have overlooked this point in its consideration of the case, and view George Washington as the actor, and put upon him, although he was in the possession of the property, and the defendants never were in the possession of it, the burden of showing the strength of his title or of failing to hold his possession, when the law is that being in possession, he was entitled to hold such possession until the defendants in error showed a title, and consequent right to the possession as the holder of such title.

By the agreed statement of facts it is shown that George Washington had been in the possession of the property for about 5 years before this suit was brought, and that prior to that time the land was vacant and unimproved (Brief of Plaintiffs in Error p. 7, paragraph 11). The land being vacant and unimproved the constructive possession followed the legal title,—the title of George Washington. It could not follow the title of the defendants in error for the constructive possession can never follow a title based on a void deed. To say that it would is equivalent to holding that constructive possession follows the last deed, whether void or not, which no court has ever yet decided.

We think the court has confounded this case with cases where purchasers under *voidable deeds* have taken possession of property and *improved it*, and thereby got a standing, in equity, as to such property, or where by color of title and possession for 15 years the adverse fee title has been extinguished, but that is not the case. Here, *by the agreed statement of facts*, we have only an absolutely void deed, and nothing more—no possession, no improvements, no payment of taxes.

The court is equally in error in assuming that *it was virtually conceded* that if George Washington was an ordinary litigant he would be barred.

It is true that the fact that George Washington was a tribal Indian, and as such was not affected by any laws of the State was urged on the argument, but the point was distinctly made that George Washington would be entitled to judgment herein if he had, at all times been *a white boy*.

On pages 28 and 29 of our brief we stated:

"But we do not think it is necessary to go into the examination of the *Indian title* in this case, for the guardian's deed is absolutely void—would be void if George Washington had, at all times, been a white boy, and not a Shawnee Indian, and no question of the statute of limitations can enter into this case, as under the agreed statement of facts, George Washington, the defendant, and R. R. Dunbar, his agent, have been in the possession of the property for

more than five years, and there is no pretense that the plaintiffs, or their grantors, were ever in the possession of the property.

"A void deed is a nullity and has no real existence, and there is no necessity for any action to set it aside or have it cancelled, and it is impotent to start the statute of limitations in its favor.

Waterson vs. Devoe, 18 Ks. 223;
Hall vs. Dodge, 18 Ks. 277;
Higginbotham, 9 Ks. 328;
McGee vs. Thomas, 9 Ks. 343;
Rogers vs. Clemmans, 27 Ks. 522.

"In regard to the point that the defendant, George Washington, is estopped from denying the validity of the deed made by his pretended guardian because he received some of the money derived from the sale of the land, we would state the money was received by the defendant, if at all, while he was a minor, and aside from the fact that he could not be estopped, because he is a Shawnee Indian, he would not be estopped if he had been a white boy, by receiving the money while he was still a minor."

Respectfully submitted,

BIRD & POPE,
Attorneys for Plaintiffs in Error.

Kansas City, Mo., April 30, 1903.

[Endorsed:] No. 13,005. R. R. Dunbar *et al.*, plaintiffs in error, vs. Sanford M. Green *et al.*, defendants in error. Petition for rehearing. Filed May 1, 1903. D. A. Valentine, clerk supreme court. Bird & Pope, att'ys for pl'ffs in error.

And be it further remembered, that on the 9th day of May 1903 the same being one of the regular judicial days of the January 1903 term of the supreme court of the State of Kansas, said court being in session at its court room in the city of Topeka, there being present the chief justice, and the six other justices heretofore last mentioned, the following proceeding was had and remains of record to-wit:—

R. R. DUNBAR, Pl'ff in Error,
vs.
SANFORD M. GREEN, Def't in Error.
} No. 13005.

Journal Entry Overruling Petition for Rehearing.

Now comes on for decision the petition for a re-hearing of this cause. And thereupon it is *ordered* that said petition be denied.

And afterwards on the 25th. day of January A. D. 1904, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation, which, with the acknowledgement of the service of the same and the endorsements thereon is in words and figures following to-wit:—

UNITED STATES OF AMERICA, ss:

To Lucretia L. Green, William E. Green, Effie Green, Lina Hill, Fannie E. McHale, and Lottie De Wit:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Kansas, in a cause wherein R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. H. Payne, John Small and George Dunbar, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22d day of January, A. D. 1904.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the
State of Kansas.

Service of the foregoing citation hereby acknowledged to the same effect as if duly served by an officer this 23 day of Jan., A. D. 1904.

F. M. WOODS &
F. M. McHALE,
By F. M. WOODS,
Attorneys for Lucretia L. Green, William E. Green, Effie Green, Lina Hill, Fannie E. McHale, and Lottie De Wit, Defendants in Error.

[Endorsed:] No. 13,005 In the supreme court of the State of Kansas R. R. Dunbar *et al.* pl'ffs in error *vs.* Lucretia L. Green *et al.* def'ts in error Citation. Filed Jan. 25 1904 D. A. Valentine clerk supreme court.

And afterwards on the 26th. day of January A. D. 1904, there was filed in the office of the clerk of the supreme court of the State of Kansas, a writ of error, which with the allowance thereof and the endorsements thereon, is in words and figures as follows, to-wit:—

In the Supreme Court of the State of Kansas.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, Allen F. Reed, Al. Payne, T. H. Payne, John Small, and George Dunbar, Plaintiffs in Error,
vs.
LUCRETIA L. GREEN, WILLIAM E. GREEN, EFFIE Green, Lina Hill, Fannie E. McHale, and Lottie De Wit, Defendants in Error.
} No. 13005.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme judicial court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court of the State of Kansas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. H. Payne, John Small and George Dunbar, plaintiffs in error, and Lucretia L. Green, William E. Green, Effie Green, Lina Hill, Fannie E. McHale and Lottie De Wit, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, — commission held under the United States, and the decision was against the title, right, privilege, and exemption specially set up or claimed under such claim of said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of said R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. H. Payne, John Small and George Dunbar, as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on a day not exceeding thirty days from the 22 day of January, 1904, in the office of the clerk of the said Supreme Court, that the record and proceedings aforesaid being in-

spected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 25 day of January in the year of our Lord one thousand and nine hundred and four.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed January 22d 1904.

W. A. JOHNSTON,
Chief Justice Supreme Court Kansas.

[Endorsed:] No. 13,005 In the supreme court of the State of Kansas. R. R. Dunbar *et al.* plaintiffs in error *vs.* Lucretia L. Green *et al.* defendants in error Writ of error. Filed Jan. 26 1904 D. A. Valentine clerk supreme court. Original L. F. Bird & H. G. Pope att'ys for pl'ffs in error.

And also on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, an assignment of errors which assignment of errors with the endorsements thereon is in words and figures following to-wit:

In the Supreme Court of the United States, of October Term, in the Year of Our Lord One Thousand Nine Hundred and Four.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, Allen F. Reed, Al. Payne, T. H. Payne, John Small, and George Dunbar, Plaintiffs in Error,
vs.
LUCRETIA L. GREEN, WILLIAM E. GREEN, EFFIE GREEN, Lina Hill, Fannie E. McHale, and Lottie De Wit, Defendants in Error. } No. —.

Assignments of Errors.

R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. H. Payne, John Small and George Dunbar, plaintiffs in error, in connection with their petition for a writ of error, say that in the record and proceedings in said cause there is manifest error in the particulars following, to-wit:

1. The supreme court of the State of Kansas erred in affirming the decision of the district court of Wyandotte county, Kansas, and in deciding in an action of ejectment in which the plaintiffs in error

were defendants and the defendants in error were plaintiffs, that the plaintiff in error, George Washington, was not the owner of, nor entitled to the possession of the property in controversy herein, being lots 18, 42, 43, 44, 45 and 47, in block 10; lots 10, 11, 12, 13, 27, 28, 29, 30, in block 8; lots 18, 19, 20, 23, 24, 25, 26, 35, 36 in block 11; lot 9 in block 12; lots 33, 34 in block 13; lots 19, 20 in block 16; lots 20, 21 in block 19; lot 1 in block 7, in Argentine Heights, an addition to the city of Argentine, in Wyandotte county, Kansas, and being part of the northwest quarter of section 29, township 11, range 25, in said Wyandotte county, Kansas, and which was granted on December 28, 1859, by patent from the United States of America to Susan Whitefeather, as the head of a family consisting of herself and said George Washington, her son, members of the Shawnee tribe of Indians, under the provisions of the second and ninth articles of the treaty of May 10, 1854, between the Government of the United States and the Shawnee tribe of Indians and section 11 of the act of Congress of March 3, 1859, and with the stipulation prescribed by the Secretary of the Interior under said act of Congress of March 3, 1859, that the said land should never be sold or conveyed by the said grantor, or her heirs, without the consent of the Secretary of the Interior for the time being, and which said George Washington inherited as the sole heir of said Susan Whitefeather who died before July 10, 1862, but that the same was vested in the defendants in said suit, defendants in error herein, being derived by them through mesne conveyances from Joel F. Kinney, grantee of a guardian's deed of date October 14, 1868, from Jonathan Gore, guardian of George Washington, a minor, to said Joel F. Kinney, appointed as such by the probate court of Johnson county, Kansas, and approved by the Secretary of the Interior on May 21, 1869, and which guardian's deed was admitted to be a void deed, the said supreme court of Kansas deciding that the title of said George Washington was barred by laches and estoppel, and by the statute of limitations of the State of Kansas, although said George Washington was at all times and at the time of the trial a member of the Shawnee tribe of Indians, and was on September 26, 1900, duly made a citizen of the United States in and by the circuit court of the United States for the northern district, Indian Territory, at Vinita, and said Shawnee tribe existed as a tribe, and was so recognized by the political department of the Government of the United States from the time of the issuing of said patent to Susan Whitefeather to the time of the trial of the case, and although the property in controversy had remained vacant and unimproved until possession was taken of the same for George Washington on June 25, 1895.

2. The supreme court of the State of Kansas erred in deciding that the rights and title of George Washington, a Shawnee Indian living with his tribe, and recognized as such by the proper officers of the Government, to the land in controversy, which he inherited from his mother, Susan Whitefeather, to whom it was granted by

patent from the United States of America, under the provisions of the second and ninth articles of the treaty of May 10, 1854, between the Government of the United States and the Shawnee tribe of Indians, could be lost by his laches, and that the statute of limitations of the State of Kansas would run against him and against his rights and title to said land and that he could be estopped by receiving some money from the proceeds of a sale of said property by a guardian appointed for George Washington by the probate court of Johnson county, Kansas.

3. The supreme court of the State of Kansas erred in deciding that the rights and title of George Washington to the property in controversy could be sold and conveyed by Jonathan Gore, who was appointed guardian by the probate court of Johnson county, State of Kansas, and that said land, and George Washington, the owner, was not exempt from the jurisdiction and control of the laws of the State of Kansas, by the treaties between the Government of the United States and the Shawnee tribe of Indians of date August 8, 1831, articles 2, 9 and 10, and of May 10, 1854, articles 1, 9 and 14, and the act of Congress of January 29, 1861, admitting the State of Kansas into the Union.

4. The supreme court of the State of Kansas erred in deciding that George Washington a tribal Shawnee Indian, and recognized as such by the proper officers of the Government of the United States could be guilty of laches, and be estopped by his conduct, and barred of his interest in land under the treaty of May 10, 1854, between the Government of the United States and the Shawnee tribe of Indians.

5. The supreme court of the State of Kansas erred in deciding that George Washington a tribal Shawnee Indian was guilty of laches because for 21 years he neglected to bring his present action for the possession of the land in controversy, when said land was at all times during said 21 years vacant and unoccupied land and the only possession ever taken of the same was for said George Washington.

And the said R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. H. Payne, John Small and George Dunbar, plaintiffs in error, pray that said judgment of the supreme court of the State of Kansas, may be reversed, annulled, and altogether held for naught, and that the plaintiff in error be restored to all things which he hath lost by occasion of said judgment, and for costs of suit.

L. F. BIRD AND
H. G. POPE,
Attorneys for Plaintiff in Error.

[Endorsed:] No. 13005. In the supreme court of the State of Kansas. R. R. Dunbar *et al.* plaintiffs in error *vs.* Lucretia L. Green *et al.* defendants in error. Assignments of error. Filed Jan. 26 1904. D. A. Valentine clerk supreme court. L. F. Bird & H. G. Pope attorneys for pl'ffs in error.

In the Supreme Court of the State of Kansas.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHington, Allen F. Reed, Al. Payne, T. H. Payne, John Small, and George Dunbar, Plaintiffs in Error,
vs.
LUCRETIA L. GREEN, WILLIAM E. GREEN, EFFIE GREEN, Lina Hill, Fannie E. McHale, and Lottie De Wit, Defendants in Error.
} No. 13005.

I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all the pleadings and papers filed and all proceedings had in the above entitled cause, as the same now remain on file and of record in my office.

Witness my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office in Topeka, this 26th. day of January A. D. 1904.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

UNITED STATES OF AMERICA, Supreme Court of Kansas, } ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all thing- concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said supreme court, in the city of Topeka, this 26th. day of April A. D. 1904.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Plaintiff's costs $11.40, unpaid.
Costs of transcript $3.50, paid by plaintiff.

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1904.

E. B. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, ET AL.,
Plaintiffs in Error,

vs.

LUCRETIA L. GREEN, WILLIAM B. GREEN, EDITH GREEN, ET AL.,
Defendants in Error.

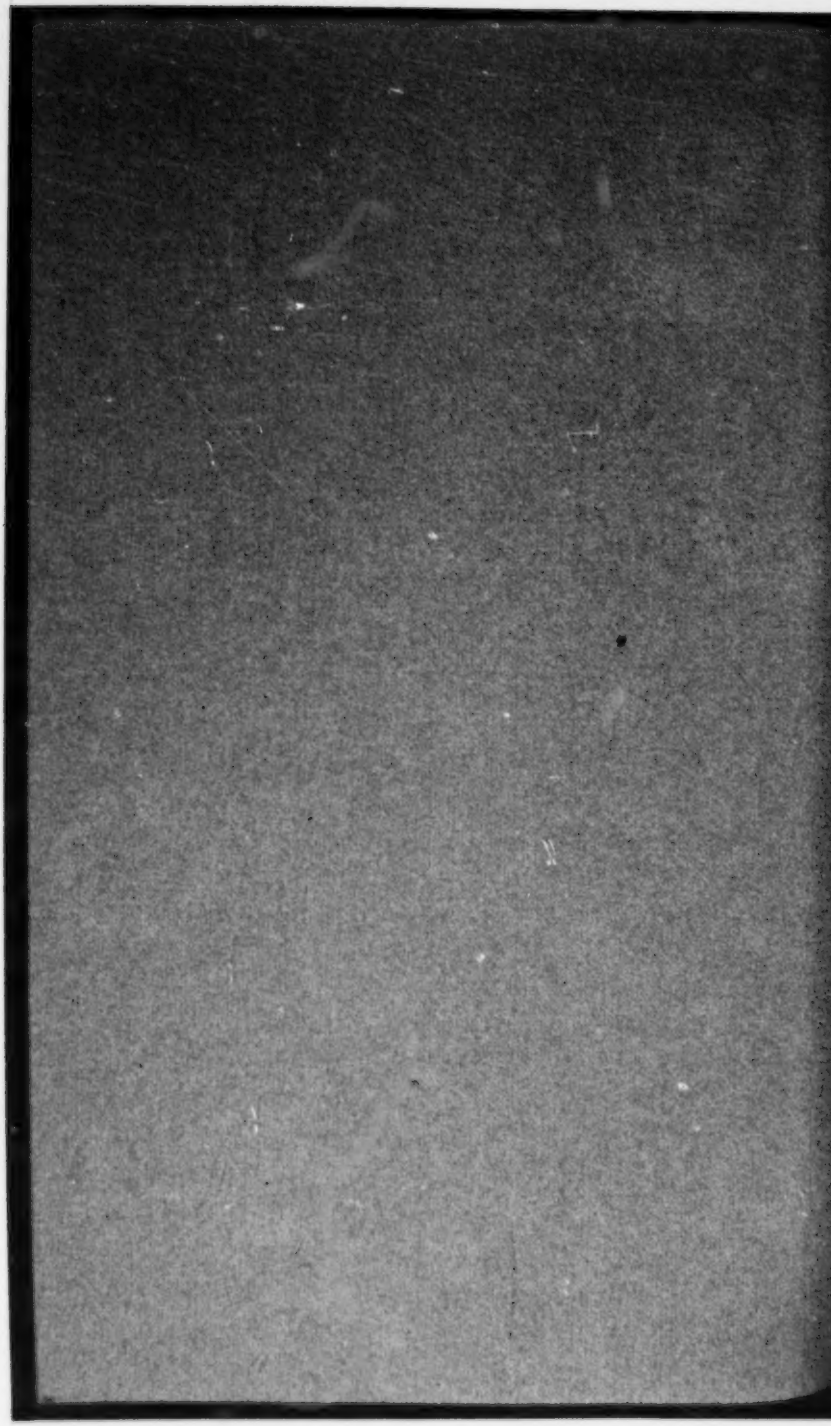
No. 259

STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

L. F. Bird and
H. G. Fort,
Attorneys for Plaintiffs in Error.

L. F. Bird,
Of Counsel.

Press of Byron S. Adams,
Washington, D. C.



IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1904.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, ET AL.,
Plaintiffs in Error,

vs.

LUCRETIA L. GREEN, WILLIAM E. GREEN, EFFIE GREEN ET AL,
Defendants in Error.

No. 260

STATEMENT OF CASE.

This was an action of ejectment brought by Sanford M. Green, Lucretia L. Green, William E. Green, and Effie Green, as plaintiffs, against R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. J. Payne, John Small and George Dunbar, as defendants, to recover the possession of Lots 18, 42, 43, 44, 45 and 47 in Block 10; Lots 8, 10, 11, 12, 13, 27, 28, 29 and 30, in Block 8; Lots 18, 19, 20, 23, 24, 25, 26, 35 and 36 in Block 11; Lot 9, in Block 12; Lots 33 and 34, in Block 13; Lots 19 and 20 in Block 16, Lots 20 and 21,

in Block 19, and Lot 1, in Block 7, all in Argentine Heights an addition to the City of Argentine, Wyandotte County, Kansas, and $500 as damages (Transcript of Record p. 1). On November 20, 1900, the defendants in said suit filed therein their separate answer and cross-petition, in which they alleged that they were the owners and in possession of the property in controversy, and asked that their title be quieted (Rec. p. 27). Said plaintiffs filed a reply to this answer (Rec. p. 28), and on the issues thus joined trial of said cause was had on Nov. 19, 1900, upon an agreed statement of facts (Rec. p. 2). From said agreed statement of facts it appeared that the property in controversy was on December 28, 1859, patented by the United States to Susan Whitefeather, as the head of a family consisting of herself and George Washington, her son, who were members of the Shawnee tribe of Indians, the patent reciting that it was issued under the provisions of the second and ninth articles of the treaty of May 10, 1854, between the United States and the Shawnee tribe of Indians, and section 11 of the act of Congress of March 3, 1859, and it conveyed to said Susan Whitefeather, and to her heirs forever, the northwest quarter of Section 29, and the southeast quarter of the northwest quarter of section 30, all in township 11, south of range 25, east of the sixth principal meridian in Kansas and other lands in Wyandotte county, Kansas, "with the stipulation prescribed by the Secretary of the Interior under the act of Congress aforesaid of March 3, 1859, that the said tracts should never be sold or conveyed by the grantor or her heirs, without

the consent of the Secretary of the Interior for the time being" (Rec. pp. 3 and 4); that the Shawnee Indians existed as a tribe, and were so recognized by the political department of the government of the United States on December 30, 1870, and at all times prior to said date, and are still so recognized (Rec. p. 5); that on said December 28 1859, certain lands (not in controversy in this action) and situated in Johnson County, Kansas, were on December 28, 1859, patented by the United States of America, to George Washington, as the head of a family consisting of himself, Judy Washington, David Washington and Rebecca Washington, who were members of the Shawnee tribe of Indians, and recited that it was issued under the provisions of the second and ninth articles of the treaty of May 10, 1854, between the United States and the Shawnee tribe of Indians, and section 11 of the act of Congress of March 11, 1859, and it conveyed said lands to said George Washington, as the head of a family, consisting of himself, Judy Washington, David Washington and Rebecca Washington, and to his heirs forever, "with the stipulation prescribed by the Secretary of the Interior under the act of Congress aforesaid, of March 3, 1859, that the said tracts should never be sold or conveyed by the grantor or his heirs, without the consent of the Secretary of the Interior for the time being (Rec. pp. 5 and 6); that on November 27th, 1867, Jonathan Gore of Johnson County, Kansas, was by the probate court of said Johnson County, Kansas, and on the application of George Washington, a minor over the age of fourteen

years, and who represented that his parents George Washington and Judy Washington were both dead, appointed as the guardian of the person and property of said George Washington, and took the oath of office, as such guardian, (Rec. pp. 6 and 7); that the only lands in which George Washington, minor heir of Susan Whitefeather, deceased, was interested, were located in Wyandotte County, State of Kansas, (Rec. p. 8); that on March 2, 1869, said Jonathan Gore, describing himself as guardian of George Washington, minor heir of Susan Whitefeather, deceased, petitioned the probate court of Johnson County, Kansas, for the sale of the northwest quarter of section 29, and the southeast quarter of the northwest quarter of Section 30, all in township 11, south of range 25, east of the 6th principal meridian, in Wyandotte County, Kansas, for the reason that said ward was not possessed of any personal property that could be appropriated to his proper use and benefit and that said land was unproductive timber land from which he received no income and same was subject to waste by reason of trespass, and that it was necessary that said land should be sold for the benefit of said ward, which petition was by said court found to be true, and said guardian was ordered to sell the interest of said minor in said real estate at private sale and make return of his proceedings to said court (Rec. pp. 9 and 10); that said Jonathan Gore, guardian, filed in said probate court a sale bond in the sum of $4,000 to account for the proceeds of the sale of said land, with S. M. Cornatzer and

Jas. A. Walker as sureties, and an appraisment of said property at $2,000, made by David Bluejacket and Jonathan Sparlin, two residents of Wyandotte County, Kansas, (Rec. p. 11); that on March 18, 1869, said Jonathan Gore, guardian, made and filed in said probate court of Johnson County, Kansas, his report of the sale of said land, at private sale, on March 3, 1869, to Joel F. Kinney for $2,000, which sale was by said probate court on said March 18, 1869, approved and confirmed (Rec. pp. 12 and 13); that on October 14, 1868, said Jonathan Gore, describing himself as guardian of George Washington, a Shawnee Indian and minor heir and sole heir of Susan Whitefeather, deceased, conveyed said land to Joel F. Kinney, for the expressed consideration of $2,000, and said deed was on May 21, 1869, approved by J. D. Cox, Secretary of the Interior, but said deed did not recite that it was made in pursuance of any authority from any court (Rec. pp. 13 and 14); that from the certificates accompanying said deed it appeared that it was a deed of conveyance made and executed by George Washington, a Shawnee Indian, by his guardian, Jonathan Gore, and Graham Rogers and Charles Tucker, the two chiefs of the Shawnee Nation, certified that George Washington was the sole heir of Susan Whitefeather, deceased, a Shawnee Indian (Rec. p. 14); that on July 10, 1862, on the petition of Jacob Whitefeather and Elizabeth Longtail, wherein it was stated that George Washington was a minor under the age of fourteen years, and resident of said Wyandotte County, and that his father and mother were both dead, and that he

was the only surviving child and said petitioners were the brother and sister of the deceased mother of said infant, and at the time of the decease of the mother of said infant said Elizabeth Longtail took the said infant into her care and custody and had kept him from that time, a period of about six years, and said infant had about 400 acres of land situated in said county of which about 10 acres was under improvement with a small cabin on it, and had personal property to the amount of $400, and the annual rents and income of said 10 acres under improvement was $25, and his property was so situated that it required the care and judgment of a person of mature years and said Elizabeth Longtail was a suitable person to be the guardian of said infant, and requesting her appointment as such guardian, said appointment was on said day made by said probate court of Wyandotte County, Kansas, and said Elizabeth Longtail duly gave bond and took the oath of office as such guardian (Rec. pp. 17 to 19); that said deed from Jonathan Gore, guardian, to Joel F. Kinney, was the only deed to said land, in which the lots in controversy are located, that has been approved by the Secretary of the Interior (Rec. p. 19), and whatever title to the land in controversy that was acquired by said Joel F. Kinney by said deed from Jonathan Gore, guardian, was by mesne conveyances vested in the plaintiffs in said suit (Rec. p. 26); that the reported decision of the case of Hannon vs. Taylor, 57 Kan. 1 (45 Pac. Rep. 51), contains the laws of the Shawnee tribe of Indians, and that the following laws of said tribe have been in effect ever

since the year 1854, viz: Article 5, of said Shawnee laws in which it is provided by the national council of said tribe that in addition to their duties as councillors, the Shawnee Chiefs and Council shall be required and authorized to appoint guardians for insane and incompetent persons and also for all minor orphan children on application being made by some competent and responsible person or persons for that purpose (Rec. pp. 19 and 20); that George Washington, one of said defendants, and son of Susan Whitefeather, deceased, and a Shawnee Indian, was made a citizen of the United States at Vinita, Indian Territory, before Judge Gill, United States Circuit Judge of the northern district, Indian Territory, on September 26, 1900, and that said defendant R. R. Dunbar had been in the possession of the property in controversy herein for the last five years as the agent and tenant of George Washington, and that said land was vacant and unoccupied up to the time said R. R. Dunbar so took possession of the same (Rec. p. 26).

Said cause was taken under advisement by the trial court and on December 14, 1901, said court found for the plaintiffs and against the defendants, and that at the time of the commencement of said action the said plaintiffs were the owners and entitled to the immediate possession of said real property, and that said defendants wrongfully withheld the possession of said property from them, and the judgment of the court was that said plaintiffs recover of said defendants the possession

of said property, with costs of suit, and that execution issue therefor, defendants excepting (Rec. p. 29).

Thereafter said defendants, as plaintiffs in error, prosecuted their proceeding in error to reverse said judgment, to the Supreme Court of the state of Kansas, and Sanford M. Green, one of the defendants in error having died, by due proceedings therefor, and by consent, the said action was revived in said Supreme Court of Kansas, in the names of Lucretia L. Green, Effie Green, William E. Green, Lina Hill, Fannie E. McHale and Lottie DeWit, and ordered to proceed against them (Rec. p. 30).

And thereafter and on April 11, 1903, said judgment of the District Court of Wyandotte County, Kansas, was by the said Supreme Court of Kansas, affirmed, with costs (Rec. p. 30), and in its decision in said case it was held that George Washington, although a member of the Shawnee tribe of Indians, was guilty of laches in not sooner asserting his claim of title to the land in controversy, and that where the land of a Shawnee Indian is sold while he is a minor, by a guardian appointed by a probate court, and the Indian after coming of age delays for more than 21 years to question the validity of the deed, and the property has in the meantime greatly increased in value and passed into the hands of different owners, no fraud or concealment or other exceptional circumstances tending to excuse the delay being shown, he cannot afterwards be permitted to attack the deed on the ground that the proceedings upon which it

was based were void for want of jurisdiction (Rec. pp. 31 to 37).

On May 1, 1903, the said plaintiffs in error filed their petition for a rehearing in said Supreme Court of Kansas, and same was by said court overruled and denied on May 9, 1903.

Thereafter this writ of error was sued out and allowed to revise the said judgment of the Supreme Court of the State of Kansas.

SPECIFICATION OF ERRORS.

1. The Supreme Court of the State of Kansas erred in affirming the decision of the District Court of Wyandotte County, Kansas, and in deciding in an action of ejectment in which the plaintiffs in error were defendants and the defendants in error were plaintiffs, that the plaintiff in error, George Washington, was not the owner of, nor entitled to the possession of the property in controversy herein, being lots 18, 42, 43, 44, 45 and 47, in Block 10; lots 10, 11, 12, 13, 27, 28, 29, 30 in Block 8; lots 18, 19, 20, 23, 24, 25, 26, 35, 36 in Block 11; lot 9 in Block 12; lots 33, 34 in Block 13; lots 19, 20 in Block 16; lots 20, 21 in Block 19; lot 1 in Block 7, in Argentine Heights, an addition to the City of Argentine, in Wyandotte County, Kansas, and being part of the northwest quarter of Section 29, Township 11, Range 25, in said Wyandotte County, Kansas, and which was granted on December 28, 1859, by patent from the United States of Amercia to Susan Whitefeather, as the head of a family consisting of herself and said George Washington, her son, members of the Shawnee tribe of Indians, under the provisions of the second and ninth articles of the Treaty of May 10, 1854, between the Government of the United States and the Shawnee tribe of Indians and section 11 of the Act of Congress of March 3, 1859, and with the stipulation prescribed by the Secretary of the Interior under said Act of Congress of March 3, 1859,

that the said land should never be sold or conveyed by the said grantor, or her heirs, without the consent of the Secretary of the Interior for the time being, and which said George Washington inherited as the sole heir of said Susan Whitefeather who died before July 10, 1862, but that the same was vested in the defendants in said suit, defendants in error herein, being derived by them through mesne conveyances from Joel F. Kinney, grantee of a guardian's deed of date October 14, 1868, from Jonathan Gore, guardian of George Washington, a minor, to said Joel F. Kinney, appointed as such by the Probate Court of Johnson County, Kansas, and approved by the Secretary of the Interior on May 21, 1869, and which guardian's deed was admitted to be a void deed, the said Supreme Court of Kansas deciding that the title of said George Washington was barred by laches and estoppel, and by the statute of limitations of the State of Kansas, although said George Washington was at all times and at the time of the trial a member of the Shawnee tribe of Indians, and was on September 26, 1900, duly made a citizen of the United States in and by the Circuit Court of the United States for the Northern District, Indian Territory, at Vinita, and said Shawnee tribe existed as a tribe, and was so recognized by the political department of the Government of the United States from the time of the issuing of said patent to Susan Whitefeather to the time of the trial of the case, and although the property in controversy had remained va-

cant and unimproved until possession was taken of the same for George Washington on June 25, 1895.

2. The Supreme Court of the State of Kansas erred in deciding that the right and title of George Washington, a Shawnee Indian living with his tribe, and recognized as such by the proper officers of the Government, to the land in controversy, which he inherited from his mother, Susan Whitefeather, to whom it was granted by patent from the United States of America, under the provisions of the second and ninth articles of the treaty of May 10, 1854, between the Government of the United States and the Shawnee Tribe of Indians, could be lost by his laches, and that the statutes of limitations of the State of Kansas would run against him and against his right and title to said land and he could be estopped by receiving some money from the proceeds of a sale of said property by a guardian appointed for George Washington by the Probate Court of Johnson County, Kansas.

3. The Supreme Court of the State of Kansas erred in deciding that the right and title of George Washington to the property in controversy could be sold and conveyed by Jonathan Gore, who was appointed guardian by the Probate Court of Johnson County, State of Kansas, and that said land, and George Washington. the owner, was not exempt from the jurisdiction and control of the laws of the State of Kansas, by the treaties between the Government of the United States and the Shawnee tribe of Indians of date August 8, 1831, Articles 2, 9 and 10, and of May 10, 1854, Articles

1, 9 and 14, and the Act of Congress of January 29, 1861, admitting the State of Kansas into the Union.

4. The Supreme Court of the State of Kansas erred in deciding that George Washington, a tribal Shawnee Indian, and recognized as such by the proper officers of the government of the United States could be guilty of laches, and be estopped by his conduct, and barred of his interests in land under the treaty of May 10, 1854. between the Government of the United States and the Shawnee tribe of Indians.

5. The Supreme Court of the State of Kansas erred in,deciding that George Washington, a tribal Shawnee Indian, was guilty of laches because for 21 years he neglected to bring his present action for the possession of the land in controversy, when said land was at all times during said 21 years vacant and unoccupied land and the only possession ever taken of the same was for said George Washington.

BRIEF OF THE ARGUMENT.

We think that it would be better to present all of the above specifications of error together.

The fee title to the property in controversy herein is admittedly in the plaintiff in error, George Washington.

The land was granted by patent from the United States to "Susan Whitefeather, the head of a family consisting of herself and George Washington," Shawnee Indians (Rec. p. 4), and the George Washington named in said patent is still alive, was made a citizen of the United States on September 26, 1900 (Rec. p. 26), and was in the possession of the property in controversy herein for the five years prior to the commencement of this action by his agent and tenant, the plaintiff in error, R. R. Dunbar (Rec. p. 26).

The title of defendants in error is grounded solely on the deed from Jonathan Gore, guardian of George Washington, a minor, to Joel F. Kinney (Rec. pp. 13, 26). If that deed is void the title of the defendants in error must fail.

In considering the validity of such guardian's deed the following facts that have been agreed to must be considered:

That George Washington, the plaintiff in error, never owned any land in Johnson County, Kansas, and

the only land that he was interested in was situated in Wyandotte County, Kansas (Rec. p. 8).

That on July 9, 1862, Elizabeth Longtail was appointed the guardian of said George Washington by the Probate Court of Wyandotte County, Kansas, and on said date the mother and father of George Washington were both dead and he was the only surviving child, and had 400 acres of land in Wyandotte County, Kansas, and had personal property to the amount of $400.00 (Rec. pp. 17 and 18).

That on October 14, 1868, Jonathan Gore, pretending to act as the guardian of George Washington, "minor heir and sole heir of Susan Whitefeather, deceased," sold the property in controversy to Joel F. Kinney, for the sum of $2,000 (Rec. p. 13).

That two George Washingtons, Shawnee Indians, were interested in patents to lands from the United States. George Washington, the plaintiff in error herein, in a patent to the land in controversy from the United States to "Susan Whitefeather, the head of a family consisting of herself and George Washington," and situated in Wyandotte County, Kansas (Rec. p. 3), and another George Washington, who was interested in a patent from the United States to "George Washington, the head of a family consisting of himself, Judy Washington, David Washington and Rebecca Washington," to lands in Johnson County, Kansas (Rec. p. 5).

That the George Washington, who was one of the grantees in the patent to the lands in Johnson County,

Kansas, and who was the head of a family consisting of himself, Judy Washington, David Washington and Rebecca Washington, died, and on November 27, 1867, and on the petition therefor of George Washington, "a minor over the age of fourteen years, whose parents are both dead," Jonathan Gore was by the Probate Court of Johnson County, Kansas, appointed as the guardian of "George Washington, a minor heir of George and Judy Washington, deceased, and over the age of fourteen years" (Rec. pp. 6 and 7).

That on October 14, 1868, Jonathan Gore, pretending to act as the guardian of "George Washington, a Shawnee Indian, minor heir and sole heir of Susan Whitefeather, deceased," made a guardian's deed for the lands in Wyandotte County, Kansas, that were patented to Susan Whitefeather, the head of a family consisting of herself and George Washington, to Joel F. Kinney, for an expressed consideration of $2,000 (Rec. p. 13), which deed was on May 21, 1869, approved by J. D. Cox, Secretary of the Interior (Rec. p. 16).

That on March 2, 1869, and about five months after his appointment as guardian of George Washington, the minor heir of George and Judy Washington, both deceased, Jonathan Gore, representing himself to be the guardian of "George Washington, a minor heir of Susan Whitefeather, deceased," petitioned the Probate Court of Johnson County, Kansas, for permission to sell "land that to him is unproductive and from which he derives no income" (without describing any land whatever), and

thereon the Court made an order for the sale of the property in controversy, and situate in Wyandotte County, Kansas, and not in Johnson County, Kansas, for cash (Rec. p. 9), and on March 3, 1869, he sold the property in controversy to Joel F. Kinney for $2,000, and reported said sale to the Probate Court of Johnson County, Kansas, on March 18, 1869, and said sale was examined, approved and confirmed by the Court on the same day (Rec. p. 12).

In brief the George Washington who is a plaintiff in error in this case was an entirely different person from the George Washington who was interested in land in Johnson County, Kansas, and for whom Jonathan Gore was appointed guardian. The George Washington who is plaintiff in error herein never lived in Johnson County, Kansas, and never owned any land there, and the Probate Court of Johnson County had no jurisdiction to appoint a guardian for either his person or his property. A guardian for George Washington was appointed by the Probate Court of Wyandotte County, Kansas, but no guardian was ever appointed for him by the Probate Court of Johnson County, Kansas. The pretended sale by Jonathan Gore, guardian, to Joel F. Kinney, was made, and deed executed, nearly five months before he petitioned the Probate Court of Johnson County, Kansas, for authority to sell the land, and the deed made by the guardian before he was authorized to make it, was and is absolutely void—a mere piece of waste paper.

Let us look into the facts in the order originally stated.

1. The plaintiff in error, George Washington, never owned any land in Johnson County, Kansas, but did own land in Wyandotte County, Kansas, and there is no showing that he ever lived in Johnson County, Kansas, and, consequently, the Probate Court of Johnson County had no authority to appoint a guardian for him, or to authorize the sale of his lands in another county.

2. Elizabeth Longtail was appointed the guardian of the plaintiff in error, George Washington, on July 9, 1862, by the Probate Court of Wyandotte County, Kansas, and no other Probate Court in the State of Kansas had any authority to appoint another guardian for either his person or his property.

It is elementary law that where a court of competent jurisdiction assumes control over a subject matter, it has such jurisdiction to the exclusion of all other courts.

Savings Bank vs. Simpson, 22 Ks., 414, 431.

3. The deed from Jonathan Gore, guardian, to Joel F. Kinney, of date October 14, 1868, is void (a) because Jonathan Gore was never appointed as guardian of the defendant, George Washington, who was the son of Susan Whitefeather, but was appointed as the guardian of George Washington, the minor son of George and Judy Washington, who lived and owned land in Johnson County, Kansas; (b) because the guardian's deed was executed and delivered by the guardian before he

obtained authority from the Probate Court to make it; (c) because the petition of the guardian for the sale of the lands of the minor did not describe the property in controversy and on account of fatal irregularities in the proceedings had for the sale of said land, and (d) because the guardian's deed is void on its face.

(a) We cannot see how it is possible for anyone to read the two patents, one to Susan Whitefeather, the head of a family consisting of herself and George Washington (Rec. p. 3), and the other to George Washington, the head of a family consisting of himself, Judy Washington, David Washington and Rebecca Washington (Rec. p. 5), in connection with the proceedings in the Probate Court of Wyandotte County, Kansas, in which Elizabeth Longtail was appointed as the guardian of George Washington, a minor, resident in Wyandotte County, Kansas, who was the only surviving child of his deceased mother, Susan Whitefeather, who had 400 acres of land situated in said county (Rec. p. 17), and the proceedings in the Probate Court of Johnson County, Kansas, in which Jonathan Gore was appointed as the guardian of George Washington, a minor, resident in Johnson County, Kansas, and whose parents, George and Judy Washington, were both dead (Rec. pp. 7 and 8), without being convinced that the George Washington for whose estate Jonathan Gore was appointed the guardian, was not the plaintiff in error herein, George Washington, the son of Susan Whitefeather.

(b) It would hardly be necessary to cite authorities

to show that a deed made by a guardian before he got authority from the court appointing him to make it, would be absolutely void. To contend that it would not be void would be equivalent to saying that no prior authority from the court is necessary.

(c) Even conceding that Jonathan Gore had been legally appointed as the guardian of George Washington, the son of Susan Whitefeather, and that he had made the guardian's deed after he had been authorizd to make it, still the proceedings leading up to the pretended sale were so fatally irregular, that they were absolutely void.

The statute in force at the time the proceedings were had was Ch. 75, Laws of 1859 (Comp. L. 1862, p. 576), which provided as follows:

"Sec. 10. When not in violation of the terms of a will by which a minor holds his real property, it may, under the direction of the Probate Court, be sold or mortgaged on the application of the guardian, either when such sale or mortgage is necessary for the minor's support or education, or where his interest will thereby be promoted by reason of the unproductiveness of the property, or of its being exposed to waste, or of any other peculiar circumstances.

"Sec. 11. The petition, for that purpose, must state the grounds of the application, must be verified by oath, and a copy thereof, with a notice of the time at which such application will be made to the court, must be served personally upon the minor, at least ten days prior to the term fixed for such application.

"Sec. 14. Before any such sale or mortgage can be executed, the guardian must give security, to the satisfaction of the court, the penalty of which shall be at least double the value of the property to be sold or of the money to be raised by the mortgage, conditioned that he will faithfully perform his duty in that respect and account for and apply all moneys received by him under the direction of the court.

"Sec. 16. Deeds may be made by the guardian in his own name, but they must be returned to the court, and the sale or mortgage be approved before the same are valid."

(d) The guardian's deed is void on its face. It does not recite or show any authority for the guardian to make the deed. A guardian's deed is the culmination of the efforts of the guardian to sell the lands of his ward, and it must show on its face that he was appointed guardian; that he presented a proper petition for the sale of the land of his ward and that thereon the court ordered him to sell it, and he did sell it in strict conformity to the orders of the court; that he gave bond as required by law to account for the proceeds of the sale of the land, and that the sale was reported to and confirmed by the Probate Court. This the deed fails to do, and it is therefore void on its face.

Young vs. Walker, 26 Ks., 242;
Duncan vs. Gillette, 37 Ks., 161.

This deed was made before the statute was enacted making guardian's deeds *prima facie* evidence of the regularity of the proceedings (Act of 1883, amending Sec. 18, Guardian and Ward Act), and no presumptions are to be indulged in favor of the validity of the guardian's deed, or the regularity of the probate proceedings.

Gatton vs. Tolley, 22 Ks., 678.

Only one thing more remains to be discussed and that is the effect of the approval of the guardian's deed by the Secretary of the Interior.

By the treaty between the United States and the Shawnee Tribe of Indians, as shown in and by the patents to the Indians, the lands to be allotted and conveyed to the Indians were not to be alienated or conveyed by them without the consent of the Secretary of the Interior for the time being. This proviso was a mere restriction on the right of the Indian to convey his lands, and did not give the Secretary of the Interior any interest in the lands or any right to convey the same, or lessen, in any degree, the absolute title of the Indian to his property, and this title cannot be taken away from the Indian by any action "of Congress, or of the Executive Departments."

Jones vs. Meehan, 175 U. S., 1.

The precise point was decided by Mr. Justice Brewer, when Circuit Judge, in the case of a Miami Indian, where the treaty provisions, in this regard, were the same as in the treaty with the Shawnees.

Richardville vs. Thorp, 28 Fed., 52.

In that case it was held that where a deed of lands purports to have been executed by the heirs of a deceased Indian, neither the "certificate of identity" required by the Interior Department nor the formal approval of the deed by the secretary of that department, are conclusive on the courts as to the identity of the grantors.

See also *Frederick vs. Gray*, 12 Ks., 518.

In the trial Court the defendants in error contended:

(1) That if George Washington was defrauded it

was his duty to commence an action to have the deed made by his guardian set aside, within a reasonable time after he attained his majority, and that he should not have waited 32 years, and after his property had been enhanced in value, before bringing his action, and

(2) He is estopped from denying the validity of the sale made by his guardian by taking and receiving, at various times, money derived by the guardian from the sale of the property.

The following cases were cited as being in point:

Felix vs. Patrick, 36 Fed., 457; s. c. 145 U. S., 317;
Hannon vs. Taylor, 57 Ks., 1;
Rubideaux vs. Vallie, 12 Ks., 28.

An examination of these cases will show that none of them are in point.

In *Felix vs. Patrick*, 145 U. S., 317, affirming 36 Fed., 457, the heirs of Sophia Felix filed a bill in equity against the defendant Patrick, and his grantees, for the purpose of having them declared trustees for the plaintiffs of certain lands in the city of Omaha, which in 1861 he had caused to be entered in the name of Sophia Felix by virtue of certain scrip issued to her as a member of the Dakota or Sioux Nation of Indians.

In 1854 Sophia Felix, a half-breed Sioux or Dakota Indian, residing in Minnesota, under the treaty of July 15, 1830, and the act of Congress of July 17, 1854, was entitled to have issued to her scrip for the location of 480 acres of land, and in 1857 such scrip was issued to her

for 480 acres, and before such scrip was located she intermarried with one David Garnelle.

On March 31, 1860, certain persons unknown procured said Sophia Felix and her husband to execute a power of attorney, in blank, and quit claim deed, in blank, and in November, 1861, Patrick obtained possession of said scrip to the amount of 120 acres, and on November 21, made an application to the land office in Omaha to locate such scrip, and thereupon, in the name of said Sophia Felix, located the same upon certain described real estate in the County of Douglas and Territory of Nebraska, and the lands were afterwards a part of the City of Omaha.

Patrick also secured the blank power of attorney and quit-claim deed and shortly thereafter caused the power to be filled up with a description of the scrip, and of the property located with it, and caused the name of William Ruth to be inserted as the attorney to sell and convey the property, and caused the quit-claim deed to be filled out with a description of the property, and inserted his (Patrick's) own name as grantee. The bill prayed that Patrick, and numerous innocent purchasers of the property from Patrick, be decreed to hold the property in trust for the plaintiff. Act of Congress of July 17, 1854 (10 Stat., p. 304), provided that no transfer or conveyance of the scrip should be valid.

The Court found:

(1) That a large part of the land had been sold to innocent purchasers, whose only notice of the infirmity in

the title was the fact that the power of attorney and quit-claim deed were dated nearly two years prior to the scrip location.

(2) That the device of a blank power of attorney and quit-claim deed was resorted to for the purpose of evading the provision of the act of Congress against the transfer or conveyance of the scrip, and as Patrick had no right to locate the scrip for his own benefit, he must be deemed to have located it for Sophia Felix.

(3) *That the moment the scrip was located, and the title of the land vested in Sophia Felix, it became subject to her disposition, precisely as any other land would be.*

4. That while Patrick took the lands as trustee for Sophia Felix, he did not take them under an express trust to hold them for her benefit, in which case lapse of time would be immaterial, but only under an implied or constructive trust. Under such circumstances the law raises an obligation upon the part of the *cestui que trust* to make use of reasonable diligence in discovering and unearthing the fraud, and in applying to the courts for legal redress, and if the plaintiff had been an ordinary white citizen, under no legal disabilities, 28 years lapse of time would be fatal to a recovery.

(5) That the bill in equity of the plaintiffs was defective in failing to show how the fraud of Patrick came to be discovered and why it was not discovered before, and in failing to allege positive acts of Patrick in endeavoring to conceal from Sophia Felix the alleged fraud.

(6) That conceding that the plaintiffs were incapable so long as they maintained their tribal relations, and did not become citizens of the United States, of being affected with laches, it did not necessarily follow that they were entitled to the relief demanded by their bill, because,

(a) Equity did not demand that a party who 28 years before was unlawfully deprived of scrip worth only $150.00 should be put in possession of property admitted to be worth over a million dollars. That in a court of equity the punishment should not be disproportionate to the offense.

(b) While the law pronounced the transaction a fraud upon Sophia Felix, yet it lacked the element of wickedness necessary to constitute moral turpitude. If there had been a deliberate attempt on the part of Patrick, by knavish practices, to beguile and wheedle her out of her lands the case would be different.

(c) Justice required only what the law, in the absence of statutory limitation, would demand—the repayment of the value of the scrip, $150.00, with legal interest thereon, and,

(d) It would scarcely be within the bounds of possibility to suppose that Sophia Felix, if she had located the scrip herself, would have realized a tithe of the sum her heirs now demand of the defendants.

We think it is apparent that this case of *Felix vs. Patrick*, was decided on the peculiar facts of that case,

and that it is no authority in a case on the law side of the court, where the doctrine of *laches* does not obtain (12 Am. & Eng. Enc. L. (1st Ed.), pp. 533, 570), and it is not an authority in a case where both the land and the Indian who owns it is impressed by statutory or treaty requirements and restrictions.

In *Hannon vs. Taylor*, 57 Ks., 1, the controversy was as to who were the heirs of one James Blacksnake, a Shawnee Indian, under the Shawnee law at the time Blacksnake died in 1862. The defendants claimed title to the entire tract of land under a deed from William Williams, a half-brother of James Blacksnake, to A. J. Gabbart and A. H. Baldwin, dated July 28, 1862, and approved by the secretary of the interior January 11, 1869. The plaintiff claimed title to the undivided one-half of said land under a deed from Ko-to-wah-cum-se, a daughter of Robert Williams, also called George Williams, and the heirs of Pish-e-qua-pe-a-se, his widow. Robert Williams was the brother of William Williams, and a half-brother of James Blacksnake. Robert Williams died in 1859, before the death of James Blacksnake. The deed to Gabbart and Baldwin was accompanied by a certificate, signed by Charles Bluejacket and Eli Blackhoof, the two chiefs of the Shawnee tribe of Indians, certifying that William Williams was the brother and sole surviving heir of James Blacksnake, deceased. The trial court found for the defendants.

The Supreme Court held that the question to be

decided in the case was *whether or not the grantors of the plaintiff, who were the heirs of Robert Williams, the half-brother of James Blacksnake, had, at the time they executed the conveyance to Hannon, a subsisting half-interest in the land.*

The plaintiff contended that the widow and child of Robert Williams, who died before James Blacksnake did, took the same share of his estate that Robert Williams would have taken if living, while the defendants contended that the whole estate went to the nearest of kin; that Pish-e-qua-pe-a-se, the widow of Robert Williams, could not inherit from James Blacksnake in any event, because she was not of his blood; that Ko-to-wah-cum-se, the daughter of Robert Williams, was one degree further removed from Blacksnake than the living half-brother; and, therefore, that she could not claim any part of his estate.

The court held that the question of heirship had to be determined by the laws, usages, and customs of the Shawnees. That there were no such laws, usages and customs until after the lands were allotted to the Indians in severalty. That as the patents were not executed until 1859, and were not delivered until 1860, and as Blacksnake died July 28, 1862, there was only a short time for the enactment of laws or the growth of customs governing the descent of real property.

Testimony was introduced showing that right after the allotment in 1857, Captain Parks, the principal chief, got up on a wagon right after a meeting held at Chilli-

cothe, Johnson County, Kansas, for the purpose of determining when and how their lands should go in case of the death of an Indian, and explained to the people that the council had decided that it would go to the nearest of kin, but no record was made of it, and the first record that was made was at a meeting held on the first Monday in December, 1868, when the descent was cast on the next of kin of the deceased, who were members of the Shawnee tribe of Indians. The next action was on May 8, 1889, when an act was passed by the Shawnee council declaratory of the Shawnee law governing the descent of land, which bore out the contention of the plaintiff. That under all the evidence there was doubt as to which was correct, the contention of the plaintiff or that of the defendants, and that in view of the certificate of the chiefs that William Williams was the sole heir of Blacksnake, and the fact that the deed to Gabbart and Baldwin had remained unchallenged for 25 years, and that during that time the city of Argentine had grown up and the land had become very valuable, the finding of the trial court would not be disturbed, as there was no claim of fraud, and the proof with reference to what the law was is so vague and indefinite that no precise conclusion could be made therefrom.

The court, however, expressly held:

(1) "If Robert Williams, as well as William Williams, had survived his deceased half-brother, James Blacksnake, it is clear that the two half-brothers would have inherited equally."

(2) "It must be conceded that the Secretary (of

the Interior) had no power to make any rule governing the descent of property, nor to make any person an heir who was not such under the Shawnee law."

(3) *"If these were really Indian lands, they were governed by the Shawnee law, and not by that of Kansas, and our statute of limitations cannot be invoked."*

If this case of *Hannon vs. Taylor,* is cited as an authority that a mere lapse of time, however great, would bar a recovery under an unextinguished Shawnee Indian title, counsel must have overlooked the following language of the court in the opinion delivered in that case:

"The deed to Gabbart and Baldwin remained unchallenged for 25 years, until the plaintiff sought to buy up the interest in the lands of those under whom he claimed. During that time the city of Argentine grew up. Railroads were constructed across the lands, and they became very valuable. *We are asked to hold that the statute of limitations applies, and that the plaintiff's cause of action is barred by lapse of time. If these were really Indian lands, they were governed by the Shawnee law, and not by that of Kansas, and our statute of limitations cannot be invoked."*

See also,

Sheldon vs. Donohoe, 40 Ks., 346;
McGannon vs. Straightlege, 32 Ks., 524;
Frederick vs. Gray, 12 Ks., 518.

In *Rubideaux vs. Vallie,* 12 Ks., 28, John Rubideaux, a Miami Indian chief, bought a tract of land in Miami County, Kansas, of Jack Vallie, and gave him therefor his promissory note for $1,900.00. When sued Rubideaux claimed that he was not liable to suit because he was a Miami Indian, but the court held that there was no law of the United States or of the state that authorized

an Indian to purchase land in Kansas, and then to refuse to pay for the same.

The case did not involve Rubideaux's right to be sued in respect to any lands allotted to him by a treaty between the United States and the Miami tribe of Indians, and is not in point.

In considering this case it must always be borne in mind that the land in controversy is Shawnee "Indian Country."

Bates vs. Clark, 93 U. S., 204;
Ex parte Kan-gi-shun-ca, 109 U. S., 556;
U. S. vs. Kagama, 6 Sup. Ct. Rep., 1112;
U. S. vs. Partello, 48 Fed., 672;
U. S. vs. Flournoy Co., 69 Fed., 866;
U. S. vs. Four Bottles of Whisky, 90 Fed., 720.

And being "Indian Country" the lands are not within the jurisdiction of the State of Kansas, nor subject to the laws thereof, and said lands cannot be taxed, or partitioned on proceedings therefor in the Kansas courts, *or sold by a guardian or administrator appointed by the state Probate Courts*, nor is said land, in any manner, subject to the laws of the State of Kansas, or process from its courts.

Coms. Miami County vs. Brackenridge, 12 Ks., 114;
Ex parte Forbes, 1 Dill., 363;
Laughton vs. Nadeau, 75 Fed., 789;
In re Le-lah-puc-ke-chee, 98 Fed., 432;
The Kansas Indians, 5 Wall., 737;
U. S. vs. Payne, 4 Dill., 389;
Harkness vs. Hyde, 98 U. S., 476;
Swope vs. Purdy, 1 Dill., 349;
Forty-three cases Cognac Brandy, 14 Fed., 542;

In re Race Horse, 70 Fed., 598;
In Persons, etc., vs. Territory, 26 P. R. (Ariz.), 311.

Nor can a Shawnee Indian, like the plaintiff, be guilty of *laches.*

Sheldon vs. Donohoe, 40 Ks., 346;
Felix vs. Patrick, 145 U. S., 317;
Laughton vs. Nadeau, 75 Fed., 789.

Nor be estopped by his acts or conduct.

Smythe vs. Henry, 41 Fed., 708;
Briggs vs. Sample, 43 Fed., 102;
Laughton vs. Nadeau, 75 Fed., 789.
Eels vs. Ross, 64 Fed., 417.

And no statute of limitations runs against him.

Sheldon vs. Donohoe, 40 Ks., 346;
Hannon vs. Taylor, 57 Ks., 1;
Felix vs. Patrick, 145 U. S., 317;
State vs. Kennard, 56 Neb., 254;

McGannon vs. Straightledge, 32 Ks., 524.

The guardian's deed is absolutely void—would be void if George Washington had, at all times, been a white boy, and not a Shawnee Indian, and no question of the statute of limitations can enter into this case, as under the agreed statement of facts, George Washington, the defendant, and R. R. Dunbar, his agent, has been in the possession of the property for more than five years, and there is no pretense that the plaintiffs, or their grantors, were ever in the possession of the property.

A void deed is a nullity and has no real existence, and there is no necessity for any action to set it aside or

have it cancelled, and it is impotent to start the statute of limitations in its favor.

Waterson vs. Devoe, 18 Ks., 223;
Hall vs. Dodge, 18 Ks., 277;
Higginbotham vs. Thomas, 9 Ks., 328;
McGee vs. Thomas, 9 Ks., 343;
Rogers vs. Clemmans, 26 Ks., 522.

In regard to the point that the defendant, George Washington, is estopped from denying the validity of the deed made by his pretended guardian because he received some of the money derived from the sale of the land, we would state the money was received by the defendant, if at all, while he was a minor, and aside from the fact that he could not be estopped, because he is a Shawnee Indian, he would not be estopped if he had been a white boy, by receiving the money while he was still a minor.

Under the treaties and acts of Congress governing the lands in dispute, neither the Shawnee Indian owners, nor their lands, are subject to the jurisdiction or control of the laws of the State of Kansas.

By the Shawnee treaty of August 8, 1831 (Revision of Indian Treaties, page 788), it is provided (Art 2) that the United States agree to grant by patent in fee simple to the Shawnees, and their heirs forever, as long as they shall exist as a nation and remain upon the same, a tract of 100,000 acres of land, to be located under the direction of the President *within* the tract of land equal to 50 miles square, which was granted to the Shawnees of the State of Missouri by the second article of the treaty of Novem-

ber 7, 1825. And it was further provided in said treaty (Art 10), that the lands so granted "shall never be sold nor ceded by them, except to the United States. *And the United States guarantee that said land shall never be within the bounds of any state or territory, nor subject to the laws thereof.*" These provisions were not abrogated by the treaty of May 10, 1854 (Revision of Indian Treaties, p. 792; *The Kansas Indians,* 5 Wall., 755).

By the treaty of May 10, 1854, the Shawnees ceded back to the United States all their lands in Kansas (Art. 1), and the United States ceded to the Indians 200,000 acres of land, and out of said land all Shawnees were entitled to, "if a single person two hundred acres, and if the head of a family, a quantity of land equal to two hundred acres for each member of his or her family." Provision was also made (Art. 4) for those of the Shawnees who might elect to live in common to make separate selections within the bounds of the tract which may have been assigned to them in common. It was further provided (Art. 9), that "Congress may hereafter provide for the issuing to such of the Shawnees as may make separate selections, patents for the same, *with such guards and restrictions as may seem advisable for their protection therein.*"

By Sec. 19 of the Act of Congress organizing the Territory of Kansas, approved May 30, 1854, it is provided, "That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as

such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with the Indian tribe, is not without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory, but all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said Territory of Kansas, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had not been passed." (10 Stat., 277.)

The same provisions were contained in the act of Congress approved January 29, 1861, admitting Kansas into the Union of States. (12 Stat., 127.)

There is no pretense or claim but what these Shawnee Indian lands remain unextinguished by treaty between the United States and such Indians, and the Shawnees have never signified their assent to the President of the United States to be included within the State of Kansas, and by treaty of May 10, 1854 (Art. 14), the Shawnees acknowledged their dependence on the government of the United States and invoked its protection and care.

The United States still recognizes the tribal char-

acter of the Shawnees and their lands are, therefore, withdrawn from the operation of the laws of the State of Kansas.

The Kansas Indians, 5 Wall., 737;
U. S. vs. Partello, 48 Fed., 672;
Ex parte Crow Dog, 109 U. S., 556;
Harkness vs. Hyde, 98 U. S., 476;
Langford vs. Monteith, 102 U. S., 140;
(Refers to act admitting Kansas into the Union);
U. S. vs. Berry, 4 Fed., 791;
Persons vs. Territory, 26 Pac. Rep. (Ariz.), 311;
Parker vs. Winsor, 5 Ks., 367;
Frederick vs. Gray, 12 Ks., 518;
Comrs. Miami Co. vs. Brackenridge, 12 Ks., 114;
Ex parte Forbes, 1 Dill., 363;
Mungosah vs. Steinbrook, 3 Dill., 418;
U. S. vs. Payne, 4 Dill., 389;
In re Lelah-puc-ka-chee, 98 Fed., 432;
Y-ta-tah-nah vs. Rebock, 105 Fed., 257;
14 Opinions Attys. Genl., 568;
20 Op. Attys. Genl., 247;
20 Op. Attys. Genl., 245.

It has been decided that such Indian lands are not subject to sale on execution (*Frederick vs. Gray*, 12 Ks., 18); that a mortgage upon such lands cannot be foreclosed by suit in a court of the state (*Comrs. Miami Co. vs. Brackenridge*, 12 Ks., 114); nor can such lands be partitioned by proceedings brought therefor in a court of the state (*Comrs. Miami Co. vs. Brackenridge*, 12 Ks., 114; *Ex parte Forbes*, 1 Dill., 363); nor can the Probate Courts of the State appoint a guardian (*Mungosah vs. Steinbrook*, 3 Dill., 418; *In re Lelah-puc-ke-chee*, 98 Fed., 432); or administrator (*U. S. vs. Payne*, 4 Dill., 389;

Y-ta-tah-nah vs. Rebock, 105 Fed., 257), of the property of such an Indian, and sell such property in the ordinary course of the administration of such estates.

In the matter of the claim of W. G. Langford to a tract of land within the Nez Perces Indian Reservation (14 Op. Attys. Genl., 568), Langford claimed title to the Missionary Station of the American Board of Foreign Missions derived by it under act of Congress of August 14, 1848, Ch. 177, and March 2, 1853, Ch. 90. He sued and recovered a judgment by default in an ejectment suit in the territorial court brought against an Indian agent occupying the same, and was put in possession thereof by a writ of assistance from said court. The attorney general of the United States held that the judgment determined nothing adverse to the Indian right; that the writ of assistance founded on such judgment was ineffectual to give Langford possession of the land to which the Indian right of occupancy still adhered, and that he was an intruder, and might be summarily removed therefrom in the mode provided by Sec. 2118, R. S. U. S.

In 20 Op. Attys. Genl., 247, it was held that an order of a court of the State of Washington enjoining an Indian agent from removing a person from an Indian reservation was void.

In 20 Op. Attys. Genl., 245, it was held that the Commissioner of Indian Affairs and his subordinates, the Indian agents, have full discretion to remove from the Indian reservation any person not of the tribe entitled to remain thereon, and cannot be interfered with by man-

damus or injunction from a court of the State, and any such order should be disregarded.

In 11 Op. Attys. Genl., 193, it was held that the lands of incompetent Wyandotte Indians were not subject to sale by a guardian appointed by a Probate Court of the state, as they were entirely exempt from the authority and control of the state. This opinion was given by Hon. James Speed on April 11, 1865.

The Supreme Court of Kansas, in its opinion, concedes that the deed of the pretended guardian of George Washington "was void for want of jurisdiction," but holds that "he took no step to challenge the validity of the guardian's deed until June 25, 1895. When, according to the agreed statement of facts upon which the case was submitted in the District Court, R. R. Dunbar, another plaintiff in error, took possession of the land as his agent," and as there was "an interval of more than 21 years after he attained his majority, within which he did nothing to assert his title or to challenge the sufficiency of the guardian's deed," he was estopped by his delay in bringing the suit and was guilty of such *laches* that he could not assert his title (Rec. p. 32). The court also says, in its decision, that "in the meantime we know, without evidence, that the property must have increased greatly in value and the record shows that it has been platted into city lots and sold in small parcels to different persons" (Rec. p. 32), but the great increase in the value of the property is not shown by the record, and does not exist in fact, as the property in controversy is of small

value, the lots being in a "boom" addition to Argentine, and, as shown by the record, the property was never fenced or in the possession of anyone until George Washington took possession of it.

Under the authorities, if the guardian's deed was void for want of jurisdiction in the Johnson County Probate Court, or because it was made five months before the guardian was authorized by such Probate Court to sell, the doctrine of *laches* would not apply even in equity, and as a defense to the cross-petition of the defendants, George Washington, and others, to quiet their title, for the reason that, according to the agreed statement of facts, they were in the peaceable possession of the property, and were under no necessity of bringing a bill to quiet their title until it was attacked (18 Am. & Eng. Encyc. L. (2d. Ed.), pp. 101, 104, 125; *Farmers Loan & Trust Co. vs. R. Co.,* 126 Fed., 46 (C. C. A., 8th. Cir.); *Wyman vs. Bowman,* 127 Fed., 258, 269 (C. C. A,, 8th. Cir.), and as their claim was not barred by any state statute of limitations, the burden would be on the plaintiffs in the suit to show, either from the face of the cross-petition of the defendants, or by the answer of the plaintiffs thereto, that extraordinary circumstances existed which required the application of such doctrine (*Wyman vs. Bowman,* 127 Fed., 258, 269 (C. C. A., 8th. Cir.).

But this was not an equitable action, but was, as stated by the Kansas Supreme Court, an action of ejectment (Rec. p. 32), and under the Kansas practice and decisions it was not converted into an equitable action by

the defendants filing a cross-petition to quiet their title, for, as was said by Mr. Justice Brewer, in delivering the opinion of the Court in *Cheesebrough vs. Parker*, 25 Ks., 566, 568, "if, instead of such general denial, the defendant sets out in detail an equitable defense, this does not change the character of the action." The action being a law action, the defense must be a plea and proof of the statutory bar, and the defense of *laches* cannot be interposed as such defense is one peculiar to courts of equity.

Beach Eq. Juris., Sec. 17;
Bates Eq. Juris., Sec. 375;
Bisphams Eq. (5th Ed.), Sec. 39;
1 Story's Eq. Juris. (12th Ed.), Sec. 64a.

In 1 Encyc. Laws of England, pp. 91-92, the law of "acquiescence" or *laches* is clearly stated. It is there said:

" 'If a person, having a right and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed, he cannot afterwards be heard to complain of the act.' This, as Lord Cottenham said (*Duke of Leeds vs. Amherst*, 2 Ph., 117), is the proper sense of the term 'acquiescence,' and in that sense it may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and it is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or without any assent on the part of the person whose 'right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him, which at all events, as a general rule, cannot be divested without accord and satisfaction,' or release under seal.

Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right, although under the name of *laches* it may afford a ground for refusing relief under particular circumstances; and it is clear that even an express promise by a person injured, that he would not take any legal proceedings to redress the injury done to him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding. (*De. Bussche vs. Alt.*, 8 Ch. D., 286.)

"The doctrine formerly covered a wider area than it now does. Before the Real Property Limitation Act of 1833, for the first time introduced a statutory rule of limitation into the court of chancery, that court, upon the principle embodied in the maxim, '*Aequitas vigilantibus non dormientibus subvenit*, was accustomed to refuse to entertain stale claims (2 Spence, 6); but it is now settled that mere delay constitutes no defence to a legal claim, unless the statutory period of limitation has expired, although it may sometimes operate to bar a right which was recognized in equity only. And, further, in cases where the plaintiff had not applied to the court with reasonable promptitude, he was sometimes required to establish his right at law before a court of equity would recognize it. Since the Judicature Acts, this practice has, of course, been abandoned (*Fullwood vs. Fullwood*, 9 Ch. D., 179).

"Acquiesence during the progress of the infringing act, or of steps necessarily leading to it, will bar a legal right only where it amounts to an encouragement to do the act or take the steps, in the belief or expectation that the right does not exist or has been abandoned ('standing by'), or is such as to raise an inference that the parties have acted upon an agreement inconsistent with the right asserted.

"The doctrine of 'standing by' rests upon the ground that it is fraudulent for any one to assert a right after having encouraged another to act upon an expectation that it does not exist, or has been abandoned (*Savage vs. Foster*, 2 White & T. L. C., 6th Ed., 678). This court will not permit a man knowingly, though passively, to encourage another to lay out money under an erroneous

opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement (Eldon, L. C., in *Dann vs. Spurrier*, 7 Ves., 231. The conditions of estoppel by standing by were carefully formulated by Fry, J., in *Willmott vs. Barber*, 15 Ch. D., 96)."

In the case at bar there is no element of "standing by," but the defendants in error, the plaintiffs in the trial court rely upon proceedings *in invitum* against a Shawnee Indian minor. The guardian's deed under which they claim being absolutely and incurably void, no affirmative action on the part of George Washington was necessary to set it aside. Being a void and not merely a voidable deed, it was in law no deed at all, and being a nullity, no rights were divested by it, and no rights could be acquired by it. It was not binding on George Washington, nor did it bar him from any interest in the property. No action on the part of the defendants in error, no inaction on the part of the plaintiff in error, George Washington, no resulting equity in third persons, and, more than all, no power residing in any legislative or other department of the government could invest it with any of the elements of juridical vitality.

The deed being absolutely void, it was impotent to start the statute of limitations in its favor, and its approval of the Secretary of the Interior did not have the effect of giving it life.

Such being the case, there was no necessity of affirmative action by George Washington to set it aside, and he could wait until his title was attacked, or some

move was made by parties claiming under such deed to establish their title under it, and that was just what he did in this case. George Washington is not the actor in this case. We did not begin the fight. He was attacked. The defendants in error, as plaintiffs in the court below, brought ejectment against him, and they prevailed in their suit, and George Washington lost. Now the defendants in error must have won in their ejectment suit on the strength of their title and not on the weakness of the title of George Washington. (*Mooney vs. Olsen,* 21 Ks., 691.) The land being vacant and unimproved before R. R. Dunbar took possession of it as the agent of George Washington, the constructive possession thereof followed the legal title of George Washington. It could not follow the title of the defendants in error, for constructive possession follows the legal title, and never follows a title based on a void deed. To hold that it could would be equivalent to saying that constructive possession follows the last deed, whether void or not, which no court has yet decided. George Washington was, therefore, the owner of the legal title to the property, and was at all times in either the actual or constructive possession of it, yet the Kansas Supreme Court has viewed George Washington as the actor, and put upon him, although in possession of the property, the burden of showing the strength of his title, or in default thereof, losing his right of possession, when the law of Kansas is that being in the possession of property, he

was entitled to hold such possesion until the defendants in error showed title to the property and consequent right to the possession thereof as the holder of such title.

We respectfully submit that there is error in the record and decision of the Supreme Court of Kansas that this Court should revise, and we respectfully ask that the judgment of the Supreme Court of Kansas be reversed, and for such other and further order and judgment herein as may be right under the law.

L. F. BIRD AND
H. G. POPE,
Attorneys for Plaintiffs in Error.

L. F. BIRD,
Of Counsel.

Supreme Court of the United States.

No. 200—October Term, 1904.

R. R. Dunbar et al., Plaintiffs in Error, vs. Lucretia L. Green et al. } In error to the Supreme Court of the State of Kansas.

[May 1, 1905.]

This was an action of ejectment brought September 22, 1900, in the District Court of Wyandotte County by defendants in error, who were plaintiffs below, to recover possession of certain lots of land in the city of Argentine. The case was tried upon an agreed statement of facts, substantially as follows:

The land was patented December 28, 1859, to Susan Whitefeather, as the head of a family, consisting of herself and her son, George Washington who were members of the Shawnee tribe of Indians. The patent was issued under the treaty of May 10, 1854, (Indian Treaties, p. 792,) with the Shawnees. Whitefeather died prior to July 10, 1862, and her son George Washington inherited the land, On November 27, 1867, he being then fourteen years of age, the Probate Court of *Johnson* County appointed Jonathan Gore as his guardian, though the land was in *Wyandotte* County. In these proceedings Washington is described as the minor heir of George and Judy Washington. Under such appointment the guardian sold the land to one Joel F. Kinney for $2,000, executing to him a guardian's deed, which was approved by the Secretary of the Interior May 21, 1869, and the title so acquired by Kinney passed by a series of conveyances to the plaintiffs Green. In these proceedings for a sale Gore described himself as guardian of George Washington, the minor heir of Susan Whitefeather, deceased. Washington remained a member of the Shawnee tribe until September 26, 1900, when he was made a citizen of the United States. He took no steps to impugn the validity of the guardian's deed until June 25, 1895, when, according to the agreed statement of facts, the defendant Dunbar took possession of the land as his agent. Up to this time it had remained vacant and unimproved. Plaintiffs recovered judgment, which was affirmed by the Supreme Court. (66 Kan. 557.)

Mr. Justice Brown delivered the opinion of the Court.

The deed of Jonathan Gore, guardian, to Joel F. Kinney, dated October 14, 1868, of property situated in *Wyandotte* County, was attacked upon the ground—

1. That Gore was never appointed guardian of the defendant, George Washington, who was the son of Susan Whitefeather, but was appointed by the Probate Court of *Johnson* County as the guardian of George Washington, while another person, named Elizabeth Longtail, was on July 9, 1862, appointed by the Probate Court of *Wyandotte* County the guardian of apparently another George Washington, the minor son of George and Judy Washington, who lived and owned land in that county. Indeed the records are in a hopeless state of confusion.

2. Because the guardian's deed was executed and delivered five months before he had obtained authority from the Probate Court to make it.

3. Because the petition of the guardian to sell the land did not describe the property, and because it was void on its face.

Not only did this not involve a Federal question, but in its opinion the Court assumed, for the purposes of the case, that the guardian's deed was void for want of jurisdiction, and placed its decision solely upon the ground that Washington had been guilty of such laches as would bar recovery.

The only Federal question turns upon the right of George Washington, a Shawnee Indian, and one of that class of persons who are aptly described as "wards of the nation," to avail himself of the Whitefeather patent, notwithstanding his assumed laches in taking possession thereunder. We are much embarrassed by the failure of the defendants in error to file a brief. But we do not understand how the defence of laches is pertinent to the case. The action is ejectment. The plaintiffs must recover on the strength of their own title, and not upon the weakness of the defendants'. The only title set up by the plaintiffs is that derived from the deed of Jonathan Gore, guardian of the defendant Washington, which is assumed by the Supreme Court to be void. The plaintiffs did not show that they were ever in possession of the land, which appears to have been vacant and unoccupied until Dunbar took possession for the defendant Washington, in June, 1895. The plaintiffs are not shown to have exercised acts of ownership, or even to have paid taxes. We do not understand the materiality of the suggestion that the defendants have lost their rights to the land by the laches of George Washington, the Indian. Laches is a defence often set up in courts of equity in bar of plaintiffs' claim, but here it is set up by the plaintiffs, as a weapon of attack, although the defendants are the only parties who are or have been in possession of the land. They have shown plaintiffs' title to be void, and that they have been in possession of the land for five years. They are entitled to stand upon their rights. As the deed was void, no affirmative action on the part of George Washington was necessary. Indeed, as plaintiffs took no action under the guardian's deed to Kinney for over thirty years, it would appear that they were guilty of greater and more inexcusable delay than the defendants.

The only difficulty arises from the cross-petition of the defendants, incorporated with their answer, in which they demand that their title be quieted, and that plaintiffs be enjoined from setting up or making any claim to the property. If this were an original petition by defendants in possession to remove a cloud from their title, it is entirely possible that the Court might find that they had been guilty of such laches as would disentitle them to recover; but the petition of plaintiffs in the case is an ordinary petition in ejectment, praying for possession of the land as against the defendants, for damages, and for an injunction pending trial. The case was tried by the Court without a jury, as an ordinary action of ejectment, and recovery decreed in favor of the plaintiffs for possession of the property, with costs. No mention was made in the opinion or judgment of the cross-petition of the defendants.

We do not see how the case can be treated other than as an ordinary action of ejectment. In the case of *Cheesebrough* v. *Parker*, (25 Kansas, 566,) it was held that where, under the practice in Kansas, an action is commenced for the recovery of real estate, the right of the plaintiff to demand a second trial under the statute is not taken away by the addition to the petition of a claim for mesne profits, nor by the fact that the defendants set up an equitable defence and claimed equitable relief in the answer. In delivering the opinion of the Court, Mr. Justice Brewer, now of this Court, observed: "Under a general denial" (in an action of ejectment) "every possible defence may be interposed. If, instead of such general denial, the defendant sets out in detail an equitable defence, this does not change the character of the action or abridge the rights of the plaintiff. It is a grand mistake to suppose that by setting up in an answer an equitable defence to an action for the recovery of real estate, either the plaintiff's right to a jury trial, or a second trial, under the statute, can be abridged. Whatever effect such defence may have upon defendants' rights, the plaintiffs' are unchanged. They have commenced an action under the statute for the recovery of property, and no rights given by such statute can be taken away by the character or form of the defence." The substance of the opinion is that an action of ejectment must be tried as at law, notwithstanding that an equitable claim or defence is set up by one of the parties.

Had the plaintiffs taken possession of the land under their guardian's deed, and an action been brought by the Indian, they might perhaps have pleaded in defence laches or the statute of limitations; but as the property remained vacant and unimproved for over twenty years, we do not see why the defendants do not stand in a position to avail themselves of the fact that the plaintiffs' only title is derived from a void deed, especially in view of the fact that the defendant Washington shows a patent to the land to his mother, Susan Whitefeather, and that he is her only heir.

The record presents the curious anomaly of a recovery by plaintiffs who have neither title nor prior possession against defendants, who have both.

Had the defendants, after taking possession, filed a bill to quiet their title and remove the cloud created by the guardian's deed, a different question would have been presented.

The judgment of the Supreme Court of Kansas is, therefore, reversed, and the cause remanded to that Court for further proceedings not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.